

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,010

ROBERT P. GALLOWAY, JR.,

v.

UNITED STATES OF AMERICA,

Appellant

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

De Long Harris

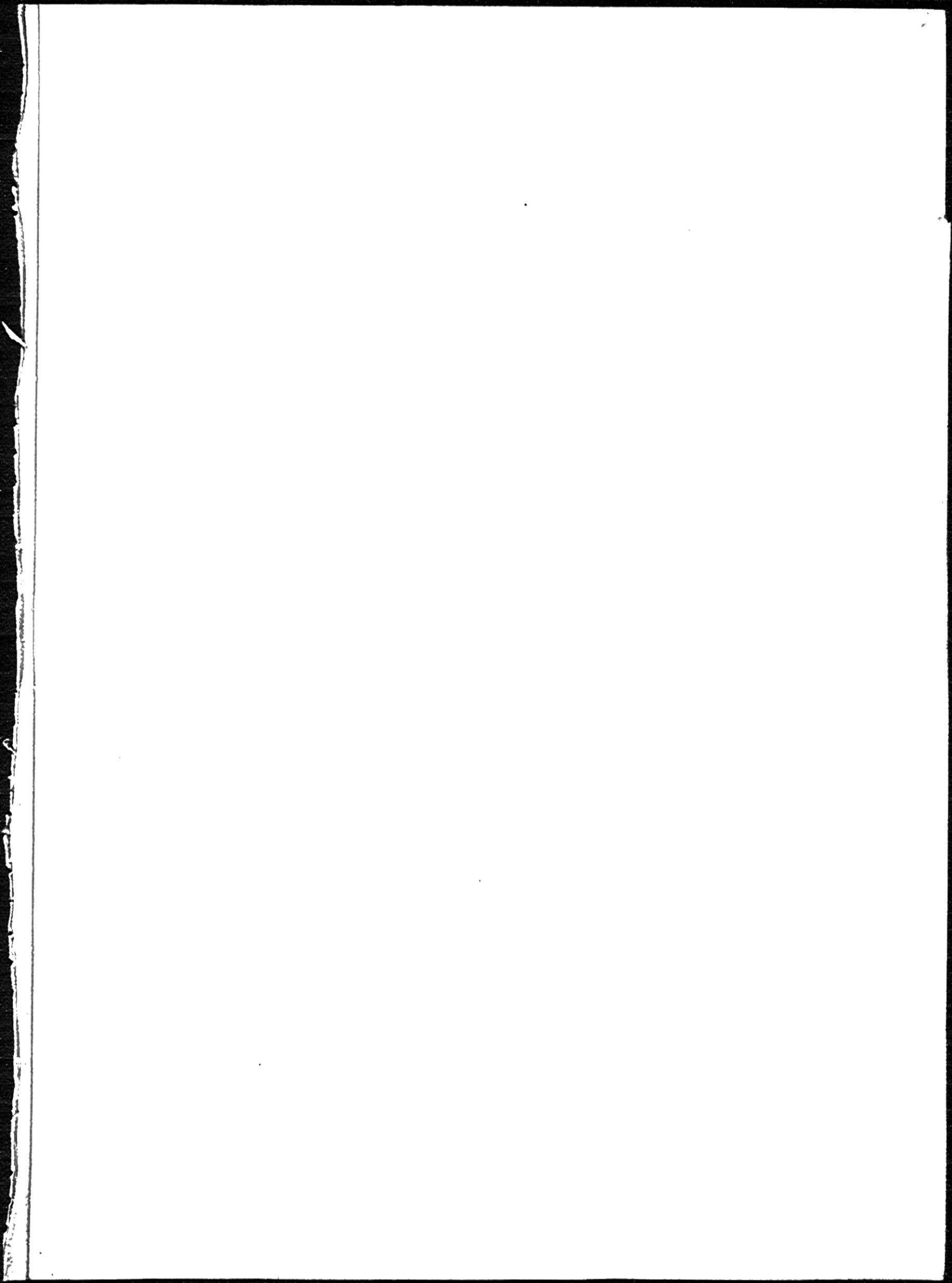
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*United States Court of Appeals
For the
District of Columbia Circuit*

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(i)

No. 13, 010

APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

I.

In a case charging accused with assault upon a policeman where there was, if believed, evidence upon which a jury could find that complainant, while not assaulting accused, was attempting or about to assault accused, or assisting, about to assist or attempting to assist an officer who was assaulting and/or seeking to keep accused in unlawful custody as a result of an illegal arrest and accused was defending against the assault and/or attempting to free himself, whether denial of request to charge on accused's right to defend against persons attempting or about to assault him and persons assisting, about or attempting to assist another in assaulting him; failure of the Court to instruct on the subject, and instruction by the Court limiting the defense of self-defense to persons having fear of harm at the hands of their assailants, is error.

II.

Whether the conviction should be reversed because of the Court's failure to instruct the jury as requested that appellant's arrest was illegal as a matter of law, when there was no competent evidence of appellant's disorderly conduct on the street while in custody of the officer who was taking him to the precinct for "questioning" about a mistakenly reported missing coat of a value of less than \$100.00; and, because the Court instructed the jury as to disorderly conduct on the street when there was no proof of disorderly conduct on the street.

III.

Whether the Court committed prejudicial and reversible error in instructing the jury upon facts not in evidence and upon assumed facts.

(ii)
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,010

ROBERT P. GALLOWAY, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was convicted on the second count of a two-count indictment charging an assault upon a member of the police force (Title 22, Section 505 District of Columbia Code) and on December 2, 1955, was sentenced to an indefinite term of imprisonment under the Federal Youth Corrections Act (Title 18, Section 5010 (b) United States Code). On date of sentence and judgment appellant filed his notice of appeal. (J. A. 8)

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1291 and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

On a date prior to March 11, 1955, Mrs. Thelma Beasley removed a coat owned by her from her restaurant. She had previously loaned the coat to her sister Mrs. Minnie Harley who managed the restaurant in the absence of Mrs. Beasley. (J. A. 75) On the evening of March 11, 1955, as she was about to leave the restaurant, Mrs. Harley discovered that the coat was missing. (J. A. 65) Mrs. Harley inquired in the neighborhood about the coat. Later officer Hilton came into the restaurant to ask about the coat. (J. A. 64) Officer Hilton asked who had been in the restaurant and was told by Mrs. Harley that several boys had been in the restaurant earlier that evening including appellant; that one boy had gone to the back where the coat was last seen by her; this boy was not appellant and Mrs. Harley did not know the name of the boy. (J. A. 65) She knew appellant's name and told the officer. She only stated that the coat was missing; she did not say that anyone stole the coat. She told the officer that the coat was worth \$79.00 or \$89.00. (J. A. 66) She testified that as many as a dozen boys had been in the restaurant during that evening.

A little while later Officer Hilton "took a boy to Number 11 Precinct by the name of Roy" upstairs to Detective Barbour in the detective room for questioning concerning the missing coat. (J. A. 10) Officer Hilton then left the precinct and shortly thereafter he saw the appellant Robert P. Galloway, a youth then 18 years old. Appellant was driving an automobile at the time. Hilton told appellant that he wanted to speak to him about a coat and that he had a report of a stolen coat. (J. A. 11) Appellant stated that he did not take a coat. Hilton testified that appellant asked permission to park his car and did so with the officer in the car; that when they got out of the car they proceeded to walk to the precinct, a block away. Just before their arrival at the precinct, Hilton testified appellant stated that he was "tired of these so-and-so's picking me up every

time". Hilton said if you don't keep quiet I am going to place you under arrest for disorderly conduct. At that time Hilton says he grabbed appellant by the belt and told him he was under arrest for disorderly conduct. (J. A. 11) Appellant was taken into the precinct but not "booked" for disorderly conduct. Instead, appellant was taken directly to the second floor detective room for questioning about the missing coat by Detective Barbour. (J. A. 22)

Appellant testified that when he first saw officer Hilton the officer told him, "I have orders to bring you in" and that Hilton refused to tell him the reason. (J. A. 81) Appellant testified that enroute to the precinct he saw his brother Ronald Galloway; that he asked his brother to tell his mother that he was being taken to the precinct and that he did not know the reason. (J. A. 82) Ronald Galloway's testimony confirmed this. (J. A. 67) Hilton testified that appellant told his brother to go tell Mama he was down at the precinct. (J. A. 20) Appellant considered himself under arrest. Ronald did tell his mother and she did go to the precinct as a result. (J. A. 60) Appellant testified that on the way to the precinct he engaged in no disorderly conduct of any sort.

The detective room is a small room about 12 x 12 on the second floor of No. 11 precinct. (J. A. 38) When Galloway was brought into this room by officer Hilton, in addition to Detective Barbour, also present and seated at a typewriter was Detective Gerber. (J. A. 105)

Galloway was told to take a seat and Hilton began to talk to Barbour in the doorway concerning the case of the "stolen coat". Government witnesses testified that Galloway was at this time hysterical and began to swear and use indecent language. Hilton testified that because he heard the boy screaming he rushed back into the room (J. A. 25) and just about this time, for no apparent reason, appellant jumped up from his chair and struck officer Barbour in the face. (J. A. 25) Barbour also testified that Galloway struck him for no cause (J. A. 50). Appellant testified that after some

conversation with an officer named Denton concerning the coat, that he was struck in the face by Barbour, (J. A. 84) (Denton denied that he was present). Appellant said that after being struck by Barbour, he then struck Barbour and that thereafter he was struck by all officers present except Hilton. (J. A. 84) Officer Hilton then seized appellant and held him in a sort of "bear hug" from behind so that his arms were retained and only his feet were free. Officer Gerber also assisted in restraining appellant and stepped on his leg and twisted his arm before Hilton dragged appellant downstairs. (J. A. 36) Hilton dragged appellant down the steps (J. A. 40) and all the while appellant was kicking and screaming and attempting to get away. (J. A. 41; 43; 84) Barbour was about 12 steps behind them (J. A. 47). When Hilton got Galloway to the first or main floor he was still kicking and still trying to free himself. (J. A. 33) Officer Paul who had been behind the rail came to the assistance of officer Hilton (J. A. 43) and in so doing officer Paul was kicked by Galloway. Officer Hilton assisted by officers Barbour and Smith then put Galloway in a cell.

Appellant was taken by police officers in custody to the D. C. General Hospital where he was given a hasty examination but not treated. (J. A. 85) On the next day and thereafter appellant was treated for his injuries by his physician Dr. Kenneth Brown (J. A. 76). Appellant had previously been operated upon for a hip injury. The hip was re-injured at No. 11 precinct. Appellant received a cut lip and contusions about the face (J. A. 77). All of the police officers except one testified that they did not observe any injuries to Galloway's face.

The arrest book showed that Galloway was charged with disorderly conduct at 9:55 p. m. (J. A. 34) this is the same time that he was charged with assault on the two officers. Officer John R. O'Bryen, the station clerk first testified that Galloway was "booked" at 10:30 p. m. or later (J. A. 33). He changed his testimony on re-direct examination after being shown the arrest book (J. A. 34). Appellant and his mother testified that

appellant was not charged with disorderly conduct until after he was returned from the hospital.¹

All of the Government witnesses denied that Galloway had been struck or assaulted by anyone. Appellant admitted striking Barbour after Barbour struck him (J. A. 84).

Appellant was charged in a two count indictment which alleged in count one an assault on officer Barbour and in count two of an assault on officer Paul (J. A. 1) in violation of Title 22, Section 505 D. C. Code. Appellant was acquitted of the charge of an assault on Barbour but was found guilty of count two, the charge of an assault on officer Paul.

At the trial the government cross-examined appellant and appellant's witnesses, Randolph Chase and Dr. Kenneth Brown concerning statements made by them to an F. B. I. agent (the F. B. I. investigated the case with a view of determining whether or not Galloway's Civil Rights had been violated (J. A. 106)). Appellant objected to the cross-examination. The government, in rebuttal, called F. B. I. agent Nagel who was permitted to testify over the appellant's objections as to matters told to him by appellant and the witnesses Chase and Dr. Kenneth Brown. (J. A. 102) The questions related to whether or not appellant had gone by Thelma's restaurant after being released on bail, whether or not Dr. Brown had removed a pin from the body of the appellant in a previous operation and whether or not the Doctor had made certain remarks to the F. B. I. agent concerning Galloway's injuries. (J. A. 104) Appellant objected to the entire line of questioning. (J. A. 102)

At the trial appellant produced eight character witnesses including a policeman, a minister, and a school counselor who testified as to the good character of the appellant.

¹ Appellant was never tried or convicted upon the charge of disorderly conduct.

The evidence showed that appellant is a High School student in regular attendance having no criminal record save traffic violations and on date of this offense was 18 years old.

Appellant's motions for judgment of acquittal at the close of the government's case and at the end of appellant's evidence were denied.
(J. A. 95)

Appellant submitted his prayer for instruction number nine which read as follows:

You are instructed:

In this case defendant has testified that he was first struck by officer Barbour. If you find this to be a fact, then you are instructed that it then became the legal right of Galloway to defend himself and to repel all persons whom he had reasonable grounds to believe were about to assault him or who were attempting to assault him or who were engaged in assisting another to assault him, with such force as Galloway reasonably believed necessary to repel his assailant or assailants.

Unless you are convinced beyond a reasonable doubt that Galloway did not act in self defense as outlined to you above, then your verdict must be Not Guilty on both counts of the indictment.

This prayer was given on the theory that officer Paul either attempted to assault appellant or assisted or attempted to assist officers Hilton and Barbour in assaulting appellant and in preventing his escape from unlawful custody. The Court promised to give the substance of the prayer but effectively denied it by failing to give any instruction on the subject. In its charge on self-defense the Court limited the defense of self-defense to persons who had reasonable fear of hurt or harm "at the hands" of their "assailant or assailants".

The jury found appellant not guilty of Count I, the assault on officer Barbour and guilty of Count II, the assault on officer Paul.

Appellant's motion for judgment of acquittal and/or new trial was denied. (J.A. 7)

Appellant was sentenced to imprisonment for an indefinite term under provisions of Title 18, Section 5010(b) United States Code, the Federal Youth Corrections Act (J.A. 8). This appeal followed.

STATUTES INVOLVED

Title 22, Section 505, D. C. Code (1951 ed.) provides:

Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. (R.S. D.C., Sec. 432)

Title 22, Section 1107, D.C. Code (1951 ed.) as amended, provides:

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language, or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those

where the offense was committed under a penalty of not more than twenty-five dollars for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, Sec. 6; July 8, 1898, 30 Stat. 723, ch. 638.)

Title 22, Section 1121 D. C. Code (1951 Ed.) as amended, provides:

Whoever, with intent to provoke a breach of peace, or under circumstances such that a breach of the peace may be occasioned thereby, -

(1) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) Congregates with others on a public street and refuses to move on when ordered by the police;

(3) Shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) Interferes with any person in any place by jostling against such person unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) Causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than \$250.00 or imprisoned not more than ninety days, or both.

STATEMENT OF POINTS

I.

The Court's failure to instruct on appellant's right to defend himself against persons attempting or about to assault him, and persons assisting, attempting or about to assist another in assaulting him and the denial of appellant's prayer for instruction number nine was prejudicial and reversible error.

II.

The conviction should be reversed because of the failure and refusal of the Court to charge that appellant's arrest was illegal and because of the erroneous instruction on disorderly conduct.

III.

The Court's instruction to the jury upon assumed facts and facts not supported by the evidence was confusing, misleading and was prejudicial and reversible error.

SUMMARY OF ARGUMENT

I.

Appellant was taken to Number 11 Precinct by officer Hilton for "questioning" concerning a coat that had been reported missing.¹ Inside the detective room of the precinct while being questioned, he struck officer Barbour after being struck by Barbour. Officer Barbour denied striking appellant. Appellant a youth 18 years old, became hysterical. Officer Hilton, assisted by officer Gerber forcibly subdued appellant. Hilton then dragged appellant down the stairs injuring his hip in the process. During all of this time appellant was kicking and screaming; only the feet of appellant were free. When appellant was dragged to the first floor by officer Hilton, officer Paul rushed up to assist Hilton and received a kick.

In a 2 count indictment, appellant was charged with (1) an assault on officer Barbour and (2) an assault on officer Paul.

¹ The coat was in fact not missing but had been taken by its owner.

At the trial appellant urged as defenses (1) resistance to illegal arrest and custody and (2) self-defense. Appellant's prayers treated of the right of appellant to defend against persons attempting or about to assault him and persons attempting or about to assist another in assaulting him. This was prayer number nine. The Court promised to give the substance of the prayer but effectively denied the same by its failure to give any instruction on the subject.

The denial of this prayer tore at the very heart and soul of appellant's defense in so far as the charge of assaulting officer Paul was concerned. Officer Paul did not assault appellant himself but unquestionably was about to render some aid or assistance to appellant's assailant. Appellant was entitled to an instruction in this regard. Not only did the Court fail to give the instruction requested but the Court limited the availability of the defense of self-defense to such a person who acts on an honest conviction that he is in present danger of bodily harm or injury "at the hands of his assailant or assailants". Actually appellant was deprived of his defense of self-defense as to officer Paul. Appellant was prejudiced and denied a fair trial as a result.

II.

Appellant was "arrested" when first apprehended by officer Hilton. The Court should have instructed the jury on this point as a matter of law but instead left to the jury the determination of a legal question without proper instructions. Contrary to the contention of the prosecution, the testimony of officer Hilton shows no basis for a re-arrest of appellant for disorderly conduct.

In any event, the arrest was illegal. The Court erred in its instructions on disorderly conduct when there was no evidentiary basis for the same and in refusing to instruct the jury that the arrest was illegal as a matter of law. Appellant was further prejudiced by the Court in effect,

telling the jury that his conduct on the street amounted to disorderly conduct. This was contrary to the actual testimony.

III.

The Court assumed certain facts as having been proved in its charge to the jury. The facts assumed were prejudicial to the appellant in some instances in other instances the assumed facts were contrary to the true facts and in all instances the jury was misled and confused. Appellant says that this constituted plain error.

ARGUMENT

I

THE COURT'S FAILURE TO INSTRUCT ON APPELLANT'S RIGHT TO DEFEND HIMSELF AGAINST PERSONS ATTEMPTING OR ABOUT TO ASSAULT HIM, AND PERSONS ASSISTING, ATTEMPTING OR ABOUT TO ASSIST ANOTHER IN ASSAULTING HIM AND THE DENIAL OF APPELLANT'S PRAYER FOR INSTRUCTION NUMBER NINE WAS PREJUDICIAL AND REVERSIBLE ERROR.

Appellant, Robert P. Galloway, Jr., a youth then 18 years old, was arrested by officer Hilton for questioning concerning a report of a stolen coat (J.A. 10, 11). Actually, and in truth, no coat had been stolen by anyone. (J.A. 15, 66) Earlier the same evening, March 11, 1955, officer Hilton had been in a restaurant managed by Mrs. Minnie Harley and while there Mrs. Harley told officer Hilton that a coat was missing. Officer Hilton did not ask Mrs. Harley when she had last seen the coat; he did ask her when she missed the coat and she stated that she missed it when ready to leave. (J.A. 65) She told officer Hilton that the coat was worth \$79.00 or \$89.00. (J.A. 66) Mrs. Harley stated to the officer that several boys had been in the restaurant that evening including the appellant and that one of the boys (not appellant) had walked to the rear of the restaurant where the coat had been last seen.

The coat belonged to Mrs. Thelma Beasley who owned the restaurant and the sister of Mrs. Harley. Mrs. Beasley had come into her restaurant and removed her coat on some date prior to March 11, 1955; Mrs. Beasley could not recall the exact date. (J. A. 75)

After talking to Mrs. Harley, officer Hilton apprehended a boy named Roy; this boy was taken to the upstairs detective room at Number 11 precinct to Detective Barbour. Officer Hilton left the precinct and shortly thereafter arrested appellant. (J. A. 10, 11) Appellant was told, in effect, that he was wanted for questioning about a report of a stolen coat and was taken to the precinct. Enroute to the precinct there was some conversation between Hilton and appellant. The testimony of officer Hilton in this regard shows plainly that the words of appellant did not amount to disorderly conduct but nevertheless, Hilton testified that he told appellant just before they arrived at the precinct that appellant was under arrest for disorderly conduct. Appellant was not immediately charged or booked with the offense of disorderly conduct but instead he was taken to the upstairs detective room for questioning about the coat and delivered to detective Barbour. (J. A. 11)

At the trial appellant urged the proposition that he was arrested when he first was approached by officer Hilton and required to accompany the officer to the precinct. The government contended that the arrest of appellant was not accomplished until appellant and the officer had almost reached the precinct, after the remarks of appellant and when Officer Hilton told appellant he was under arrest. The position of the government in this regard is not supported either by the facts or by the law. Perhaps the best definition of an arrest is in Alexander on Arrest, Volume 1, Par. 45 at pages 353; 358:

The word arrest is derived from the French word arreter which means to stop, to detain, to hinder, to obstruct. In the abstract it means "frustration of or impediment to the free movement or locomotion of another", in the concrete it means a "seizure or taking possession of another against his will". A restraint, however slight, on another's liberty to come and go or remain as he wills or wishes, whether that will or wish is known to the restrainer or not, a manifestation of governmental authority, accomplished by apparent means of exercising it and a communicated purpose to exercise it so that restraint compels one to yield involuntarily to such exercise.

At page 358:

The following are arrests: detaining to search before an arrest is contemplated following or accompanying one commanded to go or come to some designated place officer telling one 'to come over and see the Captain, or you are wanted over at the station house, which command is obeyed.

As stated in Alexander, it is the law that one who is told by an officer to come over to the station house to see the Captain, or another officer, or, that he is wanted at the station house, which command is obeyed, is "Arrested". It follows, therefore, that appellant was illegally arrested in the first instance.

Appellant testified that while in the upstairs detective room he was struck by officer Barbour; that he then struck Barbour and that all of the officers present began beating him. (J.A. 84) Of course, at this point all questioning concerning the allegedly stolen coat ceased. The officers all denied having struck appellant except officer Gerber who testified that he assisted Hilton and Barbour by stomping on one leg of appellant while he twisted the other until Hilton got a good hold on appellant. (J.A. 38)

Officer Hilton who had stepped out rushed back into the room because he heard appellant "hollering" and screaming. (J.A. 25) Hilton grabbed appellant and pinned back his neck and arms from the rear so

that only the feet of the appellant were free. Appellant, who was then hysterical, continued to scream, kick his feet and to attempt to free himself from the unlawful custody. During the struggle officer Barbour was kicked.

Officer Hilton, with the same hold, then began to drag appellant from the upstairs room down the stairs to the main or first floor of the precinct. (J.A. 46) All the while appellant continued to scream and kick his feet in a futile attempt to get away from the officer. Officer Barbour came down the stairs about 12 steps behind the appellant who was being dragged by officer Hilton. (J. A. 47)

On the first floor officer Paul heard the scuffle and saw Hilton dragging appellant. Officer Paul testified, "officer Hilton was coming down the stairs backwards and he had an arm-hold on Galloway, and Galloway Was Fighting To Attempt To Get Away". (J. A. 41) Officer Paul stated that he came over to Hilton and Galloway to remove one Chase who was standing nearby and that he proposed to assist Hilton by removing Chase. (J. A. 43) Chase merely stood by and was not engaged at all in the struggle between Hilton and Galloway. Galloway was still kicking his feet and legs furiously when officer Paul rushed up. Officer Paul received a kick in the groin. (J. A. 42, 43) There was no evidence whatsoever that appellant specifically aimed a kick at officer Paul. On the other hand, the evidence shows that only the feet of Galloway were free; that his arms were held by Hilton in a "bear hug" and that Galloway was kicking his legs wildly in an attempt to get away from Hilton.

Appellant was charged in count one of the indictment with an assault on officer Barbour and in count two with an assault on officer Paul. (J. A. 1) Appellant was found not guilty on count one, the assault on officer Barbour and was found guilty of count two, the assault on officer Paul.

Throughout the trial appellant urged as his two principal theories of defense: (1) resistance to the unlawful arrest and the resulting unlawful custody; (2) self defense.

There is no question but that the two alleged assaults were part and parcel of a single and continuous effort on the part of the youth, Galloway, to free himself from the unlawful custody and to defend himself against the assaults and attempted assaults of the police officers. There was an unbroken sequence in the chain of events from the time appellant struck officer Barbour in the 2nd floor detective room, whether or not Barbour struck him first, to the time when officer Paul received a kick on the first floor of the precinct. If the appellant had the right to resist the unlawful arrest and the unlawful custody and to defend himself against Barbour who made the initial assault upon him in the detective room on the 2nd floor, that right continued and he had the same right after he was dragged to the first floor. Not only did appellant Galloway have the right to defend against Barbour, Gerber and Hilton but he also had the right to defend against any person or persons whom he reasonably believed were assisting, about to assist or attempting to assist Barbour, Gerber or Hilton in assaulting him.

In his Prayer for Instruction Number Nine (substituted) (J. A. 6) appellant requested the Court to charge the jury as follows:

You are instructed:

In this case defendant has testified that he was first struck by officer Barbour. If you find this to be a fact, then you are instructed that it then became the legal right of Galloway to defend himself and to repel all persons whom he had reasonable grounds to believe were about to assault him or who were attempting to assault him or who were engaged in assisting another to assault him, with such force as Galloway reasonably believed necessary to repel his assailant or assailants.

Unless you are convinced beyond a reasonable doubt that Galloway did not act in self defense as outlined to you above, then your verdict must be Not Guilty on both counts of the indictment.

The Court promised to give the substance of prayer number nine in its charge but did not do so. This was, of course, an effective denial of the prayer. Appellant objected to the denial at the conclusion of the Court's charge. (J.A. 115)

The proposition that appellant under the circumstances, had the legal right to continue to resist and continue to defend himself against persons whom he reasonably believed to be assisting or attempting to assist his assailant or assailants and whom he reasonably believed to be about to assault him or attempting to assault him, is well founded in the law. Because of the peculiar circumstances in this case, the denial of appellant's prayer number nine was so prejudicial that it, in all probability, resulted in the conviction of appellant on count two, the assault on officer Paul which was the second in point of time.

There was nothing in the Court's charge to convey to the jury the above principals of law nor was the jury instructed on the right of appellant to continue to defend and the right to defend against persons assisting another in assaulting him and against persons attempting to or about to assault him. In this connection it is highly significant to note that the jury found appellant not guilty on the assault on officer Barbour. This alleged assault was first in point of time and was the fuse that ignited the whole affair. This resulted in the assault by officer Gerber on appellant and the assault on appellant by officer Hilton in dragging him down the stairs.

There is no conflict in the testimony as to the fact that officer Paul was attempting to assist officer Hilton at the time he was kicked. In fact, officer Paul so testified that he was about to assist Hilton by removing Chase whose intentions were not known. Chase testified that Galloway was still kicking when officer Paul rushed over in an attempt to grab Galloway's legs and received a kick. (J.A. 70; 73) In any event there was evidence that officer Paul went to the assistance of officer Hilton

who was even then, engaged in an assault upon Galloway.

In Wilson v. State (Tex.) 81 S. W. 34, it was held that one assaulted and once having the right of self defense, had the right to follow up the difficulty until he reasonably believed all danger to himself had passed. To the same effect: See also Taylor v. State (Tex.) 213 S. W. 985.

In the charge to the jury (J. A. 107) the Court said nothing from which the jury might infer that appellant had the right to defend against officer Paul who attempted to come to the assistance of officer Hilton and the other officers who had assaulted appellant and who were seeking to maintain an illegal arrest and to keep appellant in unlawful custody. The granting of appellant's prayer number nine, would have, of course served that important purpose.

The case most nearly in point which sets forth the law applicable to the circumstances of the instant case is Jenkins v. State, 59 S. E. 435. In that case the defendant shot an officer who was attempting to come to the assistance of another officer engaged in assaulting defendant in the process of maintaining an illegal arrest of defendant. The Court, in effect, held that not only did defendant have the right to resist the officer arresting him but also he had the right to use such force as was necessary to repel the second officer who sought to assist the arresting officer. The Court said:

"If, however, the defendant at the time he shot McIntyre, believed, and the facts as they then appeared to him reasonably justified his belief, that McIntyre was assisting Pressley in accomplishing his illegal arrest, he would have the same right of resistance to the apparently unlawful act of McIntyre as he had to the actually unlawful conduct of Pressley. This theory of defense arose from the facts and Should Have Been Submitted To The Jury."*

*

Emphasis supplied.

Appellant here had the same right to resist and defend against officer Paul as he had to resist and defend against officers Barbour and Hilton.

In the syllabus written by the Court in Holmes v. State (Ga.) 62 S. E. 716, we are told:

"A private citizen who joins in a felonious attempt by an officer to make an illegal arrest occupies no better position than the officer himself. If the party whom the officer was attempting illegally to arrest would have been justifiable in killing the officer, he would also be justifiable in killing a private citizen who was actually assisting the officer in the commission of the felonious act."

In Gafford v. State, 68 So. 2d. 858, where the question of self defense was being considered, the Court said:

"Clearly Cecil Melton did not provoke the difficulty with Terry. It was Terry who injected himself into the fight between Melton and Simmons by leaving the automobile and approaching the fight. He must be placed in Simmons' shoes by his aborted intervention. So placed, Cecil's acts were fully justified so far as Terry was concerned."

Thus, it is seen that in this case there should have been some instruction whereby the jury could understand that under the facts here, officer Paul must be placed in the shoes of officer Barbour and Hilton, and thus placed, accordingly, to the jury's own finding in count one,¹ appellant was fully justified in resisting officer Paul with reasonable force. See also: State v. Woodard, 58 Idaho 385; 74 P. 2d. 92 and annotation in 114 A. L. R. 634.

In the facts of this case there can be no dispute over the fact that even if officer Paul did not assault appellant, certainly he was About to

¹ The jury found appellant not guilty in Count One, the assault on Officer Barbour.

to assault him. Appellant, in his prayer number nine requested the Court to instruct the jury on the right of appellant to use reasonable force to defend against a person or persons "About" to assault him. The denial of this aspect of the prayer and the failure of the Court to give any instruction on this facet of the defense was plain and prejudicial error. The law in this regard is stated in Martin v. State 5 Ind. App. 453; 32 N. E. 594 where the Court held:

"If from any person's act or conduct one person is reasonably induced to, and does in good faith believe that another is About To Assault * and injure him, he being without fault himself, he need not wait until the assault is made, but may act upon appearances, as he in good faith at the time regards them, and defend himself."

The Court instructed the jury on self-defense as follows: (J. A. 112-113)

"But the law of self-defense is one of necessity, and in order to justify the use of force in self-defense, the following conditions must be present:

One: The person must act on an honest conviction that he is in imminent, present danger of bodily injury At The Hands Of His Assailants, * and he must have reasonable grounds for his belief.

Two: He must not be the aggressor, and mere words without more are never considered provocation.

Three: He must use no more force that reasonably appears necessary under all the circumstances to avert the threatened injury to himself.

All three of These Conditions Must Be Present In Order To Entitle One To Use Force In Self-Defense. **

It is to be noted that the jury, was instructed in effect that appellant must have acted upon an honest conviction of present danger of bodily injury "At The Hands Of His Assailant Or Assailants", * and further

* Emphasis supplied.

". . . these conditions must be present in order to entitle one to use force in self-defense". The jury could reasonably infer from the instruction given that appellant was not entitled to use force against officer Paul because Paul was not one of his assailants. Officer Paul was not engaged in actually assaulting appellant but he was either assisting, about to assist, or attempting to assist Officers Barbour and Hilton in assaulting appellant; or, was himself attempting to assault appellant. The evidence reveals also that appellant was justified in a belief that officer Paul was about to assault him. It is plain, therefore, that appellant was prejudiced in not having the jury instructed as to his defense with respect to officer Paul, whose conduct is described above. Even though appellant felt no danger of harm "at the hands" of officer Paul, under the circumstances he was entitled to use force against Paul because of the reasons above-stated.

It is entirely possible, and indeed, probable, that the jury found appellant guilty of the assault on officer Paul because these principles of law were not given in the charge. This theory is demonstrated by the fact that the jury did find appellant not guilty of the assault on Officer Barbour in Count One of the indictment. Officer Barbour actually assaulted appellant and the jury was instructed as to the law of self-defense where it applied to one actually assaulting an accused. The resulting prejudice to appellant is obvious.

The appellant's theory of defense as to officer Paul was borne out by the evidence. Appellant, therefore, was entitled to have the jury instructed upon this theory. This Court has held in McAffee v. United States, 70 App. D. C. 142; 105 F. 2d, at page 26:

"While some reliance may be placed by a trial judge upon the capacity of a jury to understand the implication of instructions nevertheless, both of the parties to the cause are entitled to have the jury clearly informed on the whole of the instructions as to the law covering their respective theories of the case, there being evidence to support each theory."

In People v. Scalisi, 324 Ill. 131; 154 N. E. 715 it was held that a defendant is entitled to have the jury instructed not only on the law applicable to facts testified to by defendant but also as to the law applicable to any facts which the jury might legitimately find from the evidence.

In a case where the trial Court announced to grant in substance a prayer for instruction proposed by defendant, where the proposed prayer was not an accurate statement of the law and the trial Court gave no instructions on the subject, this Court in Colbert v. United States, 79 App. D. C. 261; 146 F. 2d 10 at page 12, had this to say:

"Many other cases to the same effect could easily be cited, but we think enough has been said to indicate that where the judge elects to charge in his own language on all matters properly to be considered by the jury, the failure of a requested instruction to conform precisely to the law, should not relieve the Court of the duty to charge accurately upon an important phase of the evidence. Much more is this true where, as here, the Court announces its purpose so to do."

The Colbert decision is particularly applicable to the facts in the instant case. See also: Gold v. United States, 102 F. 2d. 350; Meadows v. United States, 65 App. D. C. 275; 82 F. 2d. 881; Calderon v. United States, 279 F. 556; Hendrey v. United States, 233 F. 5.

It is clear, therefore, that appellant was immeasurably prejuduced by the failure of the Court to charge as requested in this regard. The prejudice went to a substantial right such that he was thereby denied a fair trial.

II.

THE CONVICTION SHOULD BE REVERSED BECAUSE OF THE FAILURE AND REFUSAL OF THE COURT TO CHARGE THAT APPELLANT'S ARREST WAS ILLEGAL AND BECAUSE OF THE ERRONEOUS INSTRUCTION ON DISORDERLY CONDUCT.

Appellant was apprehended by officer Hilton and taken to Number 11 Precinct for questioning concerning a mistakenly reported stolen coat of a value of less than \$100.00. The value of the coat was known to the officer at the time and the officer had no reasonable grounds for a belief that appellant had the coat in his possession, nor did the officer express such a belief. The Court instructed the jury that the officer had no right to arrest appellant "for the theft" of the coat without a warrant and the Court instructed "If you should find the defendant was placed under arrest for the Theft * by the officer when he first went with him then you are instructed as a matter of law you would find such arrest was illegal". (J.A. 111) The principal vice of that language is that it was grossly misleading in that there was no evidence that officer Hilton arrested appellant "for the theft" of the coat nor did appellant ever contend such was the case. Appellant was arrested for questioning concerning the coat.

It was virtually conceded by the government and recognized by the Court in its charge that if appellant was arrested when first apprehended by Hilton such arrest would be for a misdemeanor not committed in the officer's presence and was therefore illegal.

Officer Hilton had already taken another boy, Roy, into custody and delivered him to Number 11 Precinct detective room for questioning concerning the same coat (J.A. 10). The jury could have reasonably inferred from this charge that the arrest was not illegal if it was merely

* Emphasis supplied.

for questioning and not an arrest "for the theft" of the coat, or even, that it did not constitute an arrest.

As pointed out in Point I of this Brief, appellant was effectively arrested when originally taken to the precinct. It was contended by the government at the trial that the arrest did not take place at that time but did occur when the officer told appellant that he was under arrest for disorderly conduct. As will be later shown by the testimony of Officer Hilton, quoted hereinafter, the arrest of appellant was effected when Hilton first requested appellant to come to the precinct. An arrest consists of the act of restraint and a formal announcement is not a part thereof.

After charging that if the jury found that defendant was placed under arrest for the theft of the coat by the Officer when he first went with him, the Court further instructed, "So, even if you should find that the defendant Galloway was arrested illegally in the first instance, if he later, while with the Officers* used profane language or engaged in other disorderly conduct on the public street, then you would find that he did commit a misdemeanor in the presence of the Officers* and that they* then had the official duty and right to arrest the defendant without a warrant for that misdemeanor". (J. A. 112) First of all, the Court erred in instructing the jury as to any conduct on the part of appellant, in that regard, other than that which happened at the time of the claimed arrest. The Court referred to conduct in the presence of the Officers and states that They had the right to arrest appellant. At whatever stage of the proceedings appellant's arrest was effected in any instance, all of the evidence shows that appellant was arrested only by officer Hilton. There was no other officer involved in the arrest. There was testimony as to the language of appellant when inside the precinct and while in the second-

* Emphasis supplied.

floor detective room. This language was to the effect that he referred to certain officers as "so and so's". When appellant had been taken into the detective room and about the time that he was assaulted by officer Barbour he was unquestionably already under arrest. There was no testimony that any officer other than Hilton arrested appellant. If appellant's arrest was valid, the cause and reason for the arrest must rest solely upon the events transpiring before he was taken into the precinct. The charge in this regard was both confusing and misleading for, from it the jury could have reasonably inferred that the arrest could be justified by the conduct of the appellant within the precinct or that the arrest occurred after the appellant had been taken into the precinct. This was prejudicial to appellant for the reason that most of the conduct of appellant inside the precinct, that otherwise might be considered disorderly conduct,¹ was in fact lawful custody and self-defense.

The Court charged, "there is further testimony, however, that en-route to number 11 precinct the defendant engaged in disorderly conduct and profanity; cursing and swearing on the public street". (J.A. 111) There was in fact no such testimony. The entire testimony of officer Hilton regarding all of the events from the time that he apprehended appellant to the time that appellant was taken inside the detective room for questioning is as follows: (J.A. 10-11)

Q. What did you do next?

A. I returned to the 2400 block of Nichols Avenue Southeast and that is when I saw Galloway.

Q. Tell us what, if anything, you saw when you saw him.

¹ D. C. Code Title 22 - Section 1121 (D. C. Law Enforcement Act of 1953) provides: "Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby, - (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; . . . (3) shouts or makes a noise either outside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (Shall be penalized)

This statute was read to the jury in the charge. (J.A. 111)

A. Galloway was driving his car. I walked over to his car and I told him I would like to speak to him. So he said "About what?" I said, "About a coat."

He said, "Well, will you mind getting in the car while I pull around the corner?"

He went over to Talbert Street, made a left turn on to Talbert Street and parked his car. He then got out of the car and said, "Well, what's the matter, officer Hilton?"

I said, Galloway, we got a report of a stolen coat and the lady said you were in the restaurant at the time it was missing.

He said, "I didn't take no coat."

At that time he lit a cigarette.

As we proceeded to the precinct --

Q. How did you go to the precinct?

A. We walked.

Q. Tell us what, if anything, happened or was said as you were going to the precinct.

A. Just before getting to the precinct Galloway stated that he was tired of policemen picking him up every time something went wrong over there.

I said, "Well, Galloway, you shouldn't have that attitude. If you didn't do anything, you don't have anything to worry about."

At that time he started saying something about somebody killed his father and that they wasn't going to do it to him..

So I said, "Galloway, are you sick?"

He said, "No. I am not sick."

I said, "Well, why do you want to tell me that?"

He said, "Officer Hilton, I am tired of these so-and-so's picking me up every time."

I said, "Galloway, if you don't keep quiet I am going to place you under arrest for disorderly conduct."

He said, "Well, forget it. My mother will get me out."

At that time I grabbed him in the belt and I told him he was under arrest for disorderly conduct.

Q. Did you take him in to the precinct?

A. Took him straight in to the precinct.

Q. Any particular place in the precinct?

A. Took him up to the detective room.

Q. And where is that?

A. On the second floor.

There is absolutely nothing in the above-quoted testimony showing that appellant was guilty of the offense of disorderly conduct in the presence of officer Hilton before they entered the precinct.¹ The language ascribed to appellant, "officer Hilton, I am tired of these so-and-so's picking me up everytime", was certainly not cursing, swearing or profanity. Officer Hilton did not testify to any facts warranting the arrest of appellant for disorderly conduct. If the arrest occurred at this point it was illegal and the Court should have so instructed the jury as a matter of law. Appellant in his prayer for instruction number 6-A (J. A. 5) requested the Court to charge the jury as follows:

You are instructed that as a matter of law defendant Galloway did not commit the offense of disorderly conduct in the presence of officer Hilton. Galloway was, therefore, illegally arrested and Galloway had a legal right to resist the illegal arrest and the subsequent unlawful custody with such force as was reasonable under the circumstances.

You are further instructed that unless you are convinced beyond a reasonable doubt that Galloway used force that was unreasonable and excessive under all of the circumstances, then you must find the defendant Galloway Not Guilty on both counts of the indictment.

This request was denied. Appellant objected to the denial. (J. A. 115) This was plain error. (Hersh v. United States, 68 F. 2d. 799) There was no rational basis upon which the jury could come to the

¹ The jury was left without any instruction as to the status of the appellant's arrest in event the jury found as a fact (1) that defendant was not arrested when first apprehended by officer Hilton and (2) defendant did not commit the offense of disorderly conduct on a public street. (J. A. 111-112)

conclusion that officer Hilton lawfully arrested appellant for the offense of disorderly conduct. If the jury had been instructed that appellant had not committed the offense of disorderly conduct in the presence of officer Hilton as a matter of law there would have been nothing for the jury to consider except the element of reasonable or excessive force in resisting the illegal arrest.

The Court gave to the jury as a question of fact, the issue as to whether or not appellant was arrested when originally requested by officer Hilton to come to the precinct. This was an error. The Court should have found as a matter of law that appellant was arrested when first apprehended by Hilton. Naturally appellant did not resist Hilton at this point but at the same time his going to the precinct was not voluntary. On the way to the precinct appellant saw his brother and told him to tell his mother he was being taken to the precinct. This was confirmed by Hilton's testimony. (J. A. 20) There is no doubt that appellant considered himself arrested. This 18 year old boy was merely obeying the directive of a uniformed police officer. The defendant was then arrested. Morton v. United States, 79 App. D. C. 329; 147 F. 2d 28. This Court held in Higgins v. United States, 93 App. D. C. 340; 209 F. 2d 819:

"Words or acts that would show consent in some circumstances do not show it in others . . . Non-resistance to the orders or suggestions of the police are not infrequent . . . true consent force of fear or pressure is not so readily to be found. Judd v. United States, 89 App. D. C. 66; 190 F. 2d 649, 651." (See also: Quotation from Alexander on Arrest, Vol. 1, par. 45 pages 353; 358 in point one of this brief.)

It follows that appellant's arrest was illegal upon any theory. Appellant was taken into custody for questioning concerning a missing coat that actually had not been stolen by any one and under such circumstances that his arrest therefore without a warrant was illegal and as a matter of law appellant did not commit the offense of Disorderly Conduct in the presence of the arresting officer.

The Court promised to give the substance of appellant's prayers for instruction numbered one and two (substituted) (J. A. 2) the Court effectively denied these prayers by failing to give the substance. Appellant objected to the denial. (J. A. 115) These prayers were as follows:

Number One

You are instructed that as a matter of law the arrest of defendant Galloway by officer Hilton was unlawful and illegal in the first instance and that under these circumstances it was the right of the defendant to use reasonable force to resist the illegal arrest and to free himself from the unlawful custody in the number 11 precinct and unless you are convinced beyond a reasonable doubt that the force used by Galloway was not reasonable and excessive then you must find the defendant Not Guilty upon both counts of the indictment because it is the law that it is the undoubted right of a citizen to resist an unlawful arrest.

Number Two (Substituted)

You are instructed: In this case the evidence shows that officer Hilton arrested defendant Galloway for an alleged petty larceny not committed in his presence and when Hilton could not have had probable cause for a belief that the defendant had possession of the allegedly stolen property at the time of the arrest. The arrest was, therefore, illegal. Under these circumstances, Galloway had the right to resist the unlawful arrest and the right to use reasonable force to resist those seeking to detain him in the resultant unlawful custody. You are now at liberty to consider only the question as to whether or not the government has proved to your satisfaction beyond a reasonable doubt that the force used by Galloway to resist the unlawful arrest and detention in unlawful custody was excessive and unreasonable under all of the circumstances.

If you are not convinced beyond a reasonable doubt that Galloway used unreasonable and/or excessive force, you must find Galloway Not Guilty upon both counts of the indictment.

The statute under which appellant was charged, in pertinent part, provides, "Whoever without justifiable and excusable cause" assaults a policeman shall be guilty of a felony. The gist of appellant's defense was that he did have justifiable and excusable cause for his action in kicking officer Paul. One phase of his excusable and justifiable cause was his resistance to the unlawful custody in which he found himself as a result of his illegal arrest. Appellant's prayers numbered one and two (substituted) were designed to advise the jury of that defense which was a total and complete defense in that appellant had every right to resist the unlawful arrest and to attempt to free himself from the unlawful custody. The denial of the said prayer and the failure and refusal of the Court to charge that appellant was illegally arrested as a matter of law, was reversible error.

III.

THE COURT'S INSTRUCTION TO THE JURY UPON ASSUMED FACTS AND FACTS NOT SUPPORTED BY ANY EVIDENCE WAS CONFUSING, MISLEADING AND WAS PREJUDICIAL AND REVERSIBLE ERROR.

As an essential element in the case against appellant it was incumbent upon the government to prove that the officers allegedly assaulted in violation of 22-505 D. C. Code were engaged in the performance of their official duties. If at the time officer Paul received a kick the appellant was engaged in attempting to free himself from unlawful custody resulting from an illegal arrest, or if appellant was at the time defending himself by using such force as was necessary to repel force unlawfully directed toward him, then, in either event, the jury might have found with a proper instruction that officer Paul could not have been acting in the discharge of his official duty in attempting to assist another officer who was assaulting appellant. Officer Paul had no official duty to either assist in the unlawful assault or to prevent one in unlawful custody from freeing himself.

The Court instructed the jury as to the five elements necessary to the government's proof of the offense charged and undertook to define and explain the same to the jury. (J. A. 110) The Court charged the jury as follows: (J. A. 110)

"As to the third element, that the complainant, the police officer, was in the discharge of his official duty, you are instructed as a matter of law that it is the duty of a police officer to investigate complaints of larceny and to arrest without a warrant for certain offenses. "

This portion of the charge concerned itself with setting forth the fact that the complainant was actually in discharge of his official duties. This was a matter for jury determination. Now in this case there were only two complainants, officers Barbour and Paul. Neither complainant arrested appellant. Officer Paul was at no time engaged in investigating a complaint of larceny. The evidence was also quite clear that appellant was arrested by officer Hilton, and not by one of the complainants. The Court was at this point explaining to the jury that element three (that the complainants were engaged in the performance of their official duties) had been proved as a matter of law. The factual error on the part of the Court was prejudicial to appellant in several ways. First, it assumed a fact that was not supported by any evidence, and indeed, was contrary to all of the evidence.

Secondly, it would certainly tend to confuse and mislead the jury, for nothing was said as to the true duties of officer Paul under the circumstances. Officer Paul was not engaged in either making an arrest or in investigating a larceny. The jury could assume from this charge that Paul's acts might have been in some manner connected with the arrest or the investigation of the report of the missing coat. Here was a question of fact for the determination of the jury, but the Court invaded the province of the jury and instructed upon the fact as a matter of law to the prejudice of appellant who was entitled to have the jury pass upon the question as to whether or not, under the circumstances officer Paul's acts were in

performance of his official duty. There was evidence upon which the jury could have reasonably come to the conclusion that officer Paul had no right to assist officer Hilton and was therefore not acting within the scope of his official duty.

Third, since the Court spoke of the arrest and the investigation of a larceny, the jury could well infer that this aspect of the charge referred to the activities of officer Hilton. There was no doubt from the evidence that officer Hilton arrested appellant while he was engaged in investigating an alleged larceny. (J. A. 10; 22) The jury could have concluded that officer Hilton in connection with his official duty to "investigate complaints of larceny and to arrest without a warrant for certain offenses" arrested appellant and that such arrest under the circumstances was valid. This, of course, did great violence to appellant's defense of resisting an unlawful arrest. A charge to the jury in a criminal case should not be misleading. Bollenbach v. United States, 326 U.S. 607; 90 L. Ed. 350.

"It is not sufficient that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom." Miller v. United States, 120 F. 2d 968 at page 972.

The Court charged the jury (J. A. 113) as follows:

"You are instructed that even if you find the defendant struck the officer while he was making the arrest*, yet if you further find the striking was accidental or unintentionally inflicted by the defendant, you should find the defendant not guilty." (J. A. 113)

The above quotation from the charge is a complete paragraph and is not taken out of context. Maybe the Court was referring to the officer who made the arrest of appellant, officer Hilton. If so, the charge is in error. There was absolutely no evidence whatsoever that appellant struck officer Hilton at any time and, moreover, appellant was not charged with

* Emphasis supplied.

striking or assaulting officer Hilton. Maybe the Court was referring to officer Paul who attempted to assist Hilton in assaulting or restraining appellant. There was some evidence from which the jury could have inferred that the kick received by Paul was not intentionally inflicted. But if we assume that the Court was referring to officer Paul then again the Court gave to the jury a fact not only not supported by the evidence but one contrary to all of the evidence. There was no evidence that anyone other than officer Hilton arrested appellant. This part of the charge actually leads one to believe that officer Paul was engaged in making an arrest at the time he received a kick.¹ This is even more confusing when considered along with the previously mentioned part of the charge wherein the Court spoke of the duty of the complainants (Barbour and Paul) to arrest without a warrant for certain offenses (J. A. 110). At best, this part of the charge could only serve to either confuse or to mislead the jury. A charge by the Court which assumes facts not in evidence constitutes prejudicial error. Ward v. United States, 4 F. 2d 722. It is error for a Court in instructing the jury to assume the existence of a fact which is in the province of the jury to determine from the evidence or of one in support of which there was no evidence. Dolan v. United States, 123 F. 52; Pincolini v. United States, 295 F. 468; Blanton v. United States, 213 F. 320.

The Court instructed the jury: (J. A. 111)

"There is further testimony, however, that enroute to Number 11 Precinct the defendant engaged in disorderly conduct and profanity; cursing and swearing on the public street." (J. A. 111)

As is stated elsewhere in the brief, there was no testimony that appellant engaged in profanity, cursing or swearing on the public street. According to the testimony of officer Hilton who took appellant to the

¹ Officer Barbour the other complainant did not arrest appellant although he was struck.

precinct the appellant's language consisted of ordinary and non-profane words; the appellant referred to certain officers as "so-and-so's". The entire testimony of officer Hilton in this regard is found in pages 10 and 11 of the Joint Appendix. The words "so-and-so's" are frequently used by many persons and certainly are not to be considered profane, curse or swear words. It must be borne in mind that this was an important aspect of a criminal case. If it was intended by the prosecution or by the witness officer Hilton to impute to these words a meaning not in keeping with their usual and ordinary connotation, then it was the duty of the government to produce evidence of such meaning. This was not done, so that only the ordinary meaning was proved. Even if such were not the case, then certainly the meaning would be a jury question and the Court was not warranted in giving to the jury the Court's own opinion of the meaning of the words. But appellant maintains that the words were not profane, curse or swear words and must be accepted for their usual meaning. There was testimony that inside the precinct and inside the second floor detective room appellant used profanity. Naturally, if appellant used profanity inside the precinct it had no bearing on his arrest; he was accused of disorderly conduct on a public street. The charge of the Court, stating it as a fact, that appellant used profanity and engaged in cursing and swearing on the public street was prejudicial to appellant. Also the jury might well have been misled into the mistaken belief that appellant did curse and swear on the street such that officer Hilton had some cause for taking him into the precinct when such was not the case. Or, the jury may have concluded that the testimony regarding use of profanity inside the precinct had some effect on the validity of appellant's arrest. Since the illegality of his arrest and resistance to the unlawful custody in which he found himself was one of appellant's two principle defenses, the prejudice to appellant by this charge is obvious.

Each of the three instances cited above wherein the Court's charge either assumed a fact not in evidence, contrary to the evidence, stated

as a fact something that had not been proved, or stated as a fact a matter that should have been a subject of the jury's determination, operated to deprive appellant of a substantial right. In their aggregate they effectively deprived appellant of a fair trial.

In Quercia v. United States, 289 U.S. 466; 77 L. Ed. 1321 at page 1325 the Supreme Court had this to say:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided;' that 'deductions and theories not warranted by the evidence should be studiously avoided.' Starr v. United States, 153 U.S. 614, 626, 38 L. Ed. 841, 14 S. Ct. 919; Hickory v. United States, 160 U.S. 408, 421-423, 40 L. Ed. 474, 478, 479, 16 S. Ct. 327. He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered.'" United States v. Breitling, 20 How. 252, 254, 255, 15 L. Ed. 900, 902.

On the same subject see also Sturcz v. United States, 57 F. 2d 90 and, perhaps the latest pronouncement on the matter of the invasion of the province of the jury by the Court expressed by this Court, Stewart v. United States, __ App. D.C. __; 214 F. 2d 879.

Appellant is mindful of the fact that no specific objection was made to the errors in the charge complained of in Point III of this brief. But here we have instances of plain error. Rule 52 (b) Federal Rules of Criminal Procedure provides:

"Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court. "

The assumption of facts not in evidence in the charge and the resultant confusion of the jury in this case was such plain error affecting a substantial right as was contemplated by Rule 52 (b). This Court has recognized the principle embodied in the rule and has acted pursuant to its intent in many cases both before and after enactment of the rule. In a few of these cases this Court has ruled as follows:

The error assigned and argued in defendant's brief concerns the second paragraph of the instructions. No objection or exception was taken to the charge as finally given. But the government has made no objection to consideration of the assignment error; and it is well settled that if a plain error vital to a defendant has been committed, there is power, notwithstanding absence of objection and exception, to notice and correct on the appeal. Wilborg v. United States, 163 U.S. 632, 658, 16 S. Ct. 1127, 41 L. Ed. 289; Crawford v. United States, 212 U.S. 183, 194 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Mahler v. Eby, 264 U.S. 32, 45 S. Ct. 283, 68 L. Ed. 549; Brasfield v. United States, 272 U.S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345.

Rule 8 of the Revised Rules of the Supreme Court of the United States (286 U.S. 593, 598, 28 U.S.C.A. following section 354) and Rule IX of the Rules of Practice and Procedure * * * in Criminal Cases * * *, promulgated by the Supreme Court of the United States (292 U.S. 661, 664, 28 U.S.C.A. Following section 723a do not in our view affect this power. Meadows v. United States, 65 App. D. C. 275, 82 F. 2d 881 at page 884.

"At the outset we are confronted with the fact that no motion for binding instructions was made at any stage of the case. Ordinarily, this would preclude review, but in the serious criminal cases our practice has been to notice error vitally affecting the issue, without regard to the failure of counsel to conform to the rules. Schwartz v. United States, 56 App. D. C. 105, 10 F. 2d 900. Accordingly, we have read the testimony and reached conclusion that to permit the conviction to stand would result in a miscarriage of justice." Williams v. United States, 78 App. D. C. 332, 140 F. 2d 351.

"However, we cannot escape the conclusion that in both instances the error complained of was plain; that the natural and probable influence upon the jury was prejudicial and that the right of appellant to a fair and impartial verdict of the jury was substantially affected." Robertson v. United States, 84 App. D. C. 185, 171, F. 2d 345.

"Ordinarily, failure of counsel to record his exceptions to the charge would constitute a waiver of the points not raised. It has always been the custom of this court, however, 'in cases of serious criminal offense, to check carefully the record for error prejudicial to defendant which he did not urge.' This accords with Rule 52 (b) of the Federal Rules of Criminal Procedure, which provides that 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' The basic question in any such scrutiny of the record is whether the errors which may be discovered affect 'substantial rights'. Failure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly 'affect substantial rights' within the meaning of Rule 52 (b). Tatum v. United States, 190 F. 2d 614-615 - 88 App. D. C. 386.

Among others, the Third Circuit Court of Appeals has several times considered this matter and in Asendio v. United States, 171 F. 2d 122, at page 125 said:

"On the other hand, we should find it difficult to support the position that a basic constitutional right of defendant can be denied because his counsel failed to object before or at the introduction of the colorable evidence. In United States v. Ward, etc. 3 Cir., 1948, 168 F. 2d 226, 228, we deemed reversal necessary because the trial judge inferred to the jury that failure of an accused to testify could be considered together with the testimony as to guilt, even though the accused did not assign that error as a basis for reversal; and in United States v. Pincourt, 3 Cir., 1948, 167 F. 2d 831, we reversed a conviction upon a ground discovered after appeal had been taken. We conclude that the record shows plain error in admitting, albeit unwittingly, the testimony gained as a result of the illegal search and seizure. Under Rule 52 (b) of the Federal Rules of Criminal Procedure 18 U.S.C.A. reversal is therefore necessary. See United States v. Renee Ice Cream Co., 3 Cir., 1947, 160 F. 2d 353, 355."

With respect to a rule or guide in the determination as to whether an error is "plain" or "harmless" no more instructive and illuminating discussion can be found anywhere than in Judge Frank's dissent in Liss v. United States, 137 F. 2d 995 at page 1005 wherein he says:

"I must confess that I don't understand those persons - I do not include my colleagues among them - who while purporting to worship the jury, applaud when the 'harmless error' doctrine is pushed to such an extreme as it is in the majority opinion here. My colleagues, in stating that there is a 'modern disposition to assume that an error has been harmless, 'have failed to note what five circuit courts have observed: (16) (See Fort Dodge Hotel Co. v. Bartlet, 8 Cir., 108 F. 2d 253, 259; Lynch v. Oregon Lumber Co., 9 Cir., 108 F. 2d 283, 285, 286; Farris v. Interstate Circuit, 5 Cir., 116 F. 2d 409, 412; Little v. United States, 10 Cir., 73 F. 2d 861, 866, 96 A. L. R. 839; Worcester v. Pure Torpedo Co., 7 Cir., 127 F. 2d 945, 947, 948.) There has been a new trend in the Supreme Court concerning that doctrine since at least 1936; the rule is now said to be that, if error is shown, there must be reversal 'unless it affirmatively appears from the whole record that it was not prejudicial . . ."

In Bruno v. United States, 308 U.S. 287; 84 L. Ed 257 at pages 260-261 the Supreme Court distinguishes "technical error (as opposed to plain error) saying:

"Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance, is the right of an accused to insist on a privilege which Congress has given him. "

Appellant says, therefore, that the errors complained of in Point III herein are so plain and so prejudicial as to warrant reversal of his conviction.

CONCLUSION

In conclusion, appellant submits to this Honorable Court that the Court below committed prejudicial and reversible error as to each and every one of the points hereinbefore set forth in appellant's brief, therefore, Counsel respectfully urges this Honorable Court to reverse the verdict and judgment entered against appellant in the Court below.

Respectfully submitted,

De Long Harris

1901 Eleventh Street, N. W.
Washington 1, D. C.

Counsel for Appellant
Columbia 5-7000

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JOINT APPENDIX

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

467 [Filed in Open Court, May 23, 1955, Harry M. Hull, Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

The United States of America	:	Criminal No. 491-'55
v.	:	Grand Jury No. 561-55
Robert P. Galloway	:	Assault on Member of Police Force (22 D. C. C. 505)

The Grand Jury charges:

On or about March 11, 1955, within the District of Columbia, Robert P. Galloway, without justifiable and excusable cause, did assault, resist and oppose Harry Q. Barbour, a member of the Metropolitan Police Department operating in the District of Columbia, while the said Harry Q. Barbour was engaged in the performance of his official duties.

SECOND COUNT:

On or about March 11, 1955, within the District of Columbia, Robert P. Galloway, without justifiable and excusable cause, did assault, resist and oppose John B. Paul, a member of the Metropolitan Police Department operating in the District of Columbia, while the said John B. Paul was engaged in the performance of his official duties.

* * * *

468 [Filed May 27, 1955]

PLEA OF DEFENDANT

On this 27th day of May, 1955, the defendant Robert P. Galloway, appearing in proper person and by his attorney Delong Harris, Esquire, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

* * * *

469 [Filed Oct. 12, 1955]

Cr. A. 491-55

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER ONE

You are instructed that as a matter of law the arrest of defendant Galloway by officer Hilton was unlawful and illegal in the first instance and that under these circumstances it was the right of the defendant to use reasonable force to resist the illegal arrest and to free himself from the unlawful custody in the Number 11 Precinct and unless you are convinced beyond a reasonable doubt that the force used by Galloway was not reasonable and excessive then you must find defendant Not Guilty upon both counts of the indictment because it is the law that it is the undoubted right of a citizen to resist an unlawful arrest.

(U. S. v. DI Re, 92 L. Ed. 210 at page 22)

470 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER 2

You are instructed:

In this case the evidence shows that officer Hilton arrested defendant Galloway for an alleged petty ~~larceny~~ not committed in his presence and when Hilton could not have had probable cause for a belief that the defendant had possession of the allegedly stolen property at the time of the arrest. The arrest was, therefore, illegal. Under these circumstances, Galloway had the right to resist the unlawful arrest and the right to use reasonable force to resist those seeking to detain him in the resultant unlawful custody. You are now at liberty to consider only the question as to whether or not the government has proved to your satisfaction beyond a reasonable doubt that the force used by Galloway to resist the unlawful arrest and the detention in unlawful custody was excessive and unreasonable under all of the circumstances.

If you are not convinced beyond a reasonable doubt that Galloway used unreasonable and/or excessive force, you must find Galloway NOT GUILTY Upon both counts of the indictment. * * *

473 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER THREE

You are instructed that the term "arrest" may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time.

Long v. Ansell, 63 App. D. C. 68

People v. Erlanger, 132 F. 883

You are further instructed that if you believe that officer Hilton restrained defendant of his full liberty and/or took defendant into custody for even a short period of time when Private Hilton first approached the defendant in the 2400 block of Nichols Avenue, S. E., then, as a matter of law, you are told that defendant Galloway was arrested at that time. Whether or not that arrest was illegal will depend upon the facts as you shall determine them and upon the law as I shall now give it to you:

Officer Hilton testified that he was told that the coat believed to be missing was of a value of \$75.00 to \$85.00 (corrected to less than \$100). Under this circumstance it is the law that Officer Hilton had no authority to arrest defendant Galloway unless Hilton had probable cause to believe that Galloway had in his possession the allegedly stolen coat at the time of the arrest. Probable cause may be defined as a reasonable ground for belief or such grounds as would lead a reasonable prudent man to believe the existence of a fact. If you find that Hilton arrested Galloway without probable cause to believe that Galloway had in his possession the allegedly stolen coat at the time of the arrest then the arrest was illegal and unlawful.

474

475 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER FOUR

In this case officer Hilton has testified that the defendant engaged in disorderly conduct enroute to No. 11 Precinct. Unless you find that this was true beyond a reasonable doubt then you must determine whether or not the defendant Galloway used such force as was reasonable to resist the unlawful arrest and to free himself from unlawful detention. Unless you find it as a fact beyond a reasonable doubt that the force used by defendant Galloway, if any, was ^{un}reasonable and excessive then it is your duty to find the defendant Not Guilty upon both counts of the indictment.

U.S. v. Di Re, 92 L. Ed. 210

477 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER SIX

The law in the District of Columbia with respect to disorderly conduct reads as follows:

DISORDERLY CONDUCT

Sec. 211. (a) Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby, ----

- (1) acts in such manner as to annoy, disturb, interfere with obstruct, or be offensive to others;
- (2) congregates with others on a public street and refuses to move on when ordered by police;
- (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

* * * * *

479 DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER 6-A

You are instructed that as a matter of law defendant Galloway did not commit the offense of disorderly conduct in the presence of officer Hilton. Galloway was, therefore, illegally arrested and Galloway had a legal right to resist the illegal arrest and the subsequent unlawful custody with such force as was reasonable under the circumstances.

You are further instructed that unless you are convinced beyond a reasonable doubt that Galloway used force that was unreasonable and excessive under all of the circumstances, then you must find the defendant Galloway NOT GUILTY on both counts of the indictment.

480 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER SEVEN

The jury is instructed that in this case the defendant is charged with a violation of the law which provides:

"Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates or interferes with any officers or members of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined or imprisoned"

You will note that the acts prohibited by this law, to constitute a violation of the law, must be done without "justifiable and excusable cause". In this case the defendant Robert P. Galloway has defended upon the ground, among others, that the acts allegedly done by him, if any, were in fact with "Justifiable and excusable cause". You are instructed that it is not the duty of the defendant to prove this defense but instead, the burden is upon the government to prove beyond a reasonable doubt not only that the defendant did or performed some act prohibited by the law just read to you but also that such act or acts was or were "without justifiable and excusable cause". If you are not convinced beyond a reasonable doubt

481

that the government has proved the acts alleged and that such acts were "without justifiable and excusable cause" then it is your duty to find defendant Robert P. Galloway, Jr., 'NOT GUILTY'.

482 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER EIGHT

You are instructed that:

"In the crime of assault there are at least two elements or material facts to be proved, namely the act itself and the unlawful intent" (Davenport v. U. S. 97 A. 2d 135 Munc. Crt. of Appeals).

In other words, unless you find beyond a reasonable doubt that the defendant Galloway (1) unlawfully assaulted the two officers in this case and (2) that his act was with an unlawful intent then your verdict must be "NOT GUILTY".

The defendant Galloway has produced evidence that his intent was merely to resist an illegal arrest and unlawful custody; such an intent was not unlawful. Unless the government's evidence convinces you beyond a reasonable doubt that the defendant had the necessary criminal intent, you must find defendant, 'NOT GUILTY'.

484 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER 9

You are instructed:

In this case defendant has testified that he was first struck by officer Barbour. If you find this to be a fact, then you are instructed that it then became the legal right of Galloway to defend himself and to repel all persons whom he reasonable believed were about to assault him or who were attempting to assault him or who were engaged in assisting another to assault him, with such force as Galloway reasonably believed necessary to

repell his assailant or assailants.

Unless you are convinced beyond a reasonable doubt that Galloway did not act in self defense as outlined to you above, then your verdict must be NOT GUILTY on both counts of the indictment.

486 [Filed Oct. 12, 1955]

DEFENDANT'S PRAYER FOR INSTRUCTION NUMBER 21

You are instructed that if you find after a careful analysis of the evidence that two (2) hypotheses appear, namely, one leading to the defendant's innocence and the other leading to the defendant's guilt, then you must follow the hypothesis leading to the defendant's innocence and find the defendant not guilty even though the hypothesis leading to the defendant's guilt is the more probable of the two.

494 [Filed Oct. 31, 1955]

ORDER

Upon consideration of defendant's motion for judgment of acquittal, or in the alternative for a trial de novo, and oral argument of respective counsel thereon, it is, by the Court, this 31st day of October, 1955,

ORDERED That said motion be and the same is hereby denied.

495 [Filed Dec. 2, 1955]

On this 2nd day of December, 1955 came the attorney for the government and the defendant appeared in person and¹ by counsel, DeLong Harris, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of² NOT GUILTY and a verdict of guilty of the offense of

Assault on Member of Police Force

as charged³ in count two.

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative pursuant to Section 5010(b), Title 18, U.S. Code, Under the Federal Youth Corrections Act.

* * * * *

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³ Insert. "in count(s) number " If required.

496 [Filed Dec. 2, 1955]

NOTICE OF APPEAL, CRIMINAL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NOTICE OF APPEAL

Name and address of appellant - Robert P. Galloway, Jr., D. C. Jail, Washington, D. C.

Name and address of appellant's attorney - DeLong Harris, 1901 11th Street, N. W., Washington, D. C.

Offense - Assault on Police Officer.

Concise statement of judgment or order, giving date, and any sentence -
Dec. 2, 1955 - Sentence - Committed Under Youth Corrections Act, Title
18 - Section 5010 (b) U.S. Code.

Name of institution where now confined, if not on bail - D. C. Jail.

I, the above-named appellant, hereby appeal to the United States
Court of Appeals for the District of Columbia Circuit from the above-
stated judgment.

Dec. 2, 1955
date

(Signed) Robert P. Galloway, Jr.
Appellant

(Signed) DeLong Harris
Attorney for Appellant.

1 [Filed Dec. 2, 1955]

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA

v.

:
:
:
:

Criminal No. 491-55

ROBERT P. GALLOWAY

: Wash. D. C., Oct. 7, 1955.

The above-entitled cause came on for trial before Honorable Rich-
mond B. Keech, United States District Judge and a jury. * * *

14

EVIDENCE ON BEHALF OF THE UNITED STATES

GLEN A. HILTON

* * * * *

DIRECT EXAMINATION

* * * * *

16

BY MR. CAPUTY:

Q. During the course of your official duties on March Eleventh,
1955, did you receive a report of a larceny of a coat at Thelma's Res-
taurant?

MR. HARRIS: I object to that, your Honor.

THE WITNESS: Yes, I did.

THE COURT: What is your objection, sir?

MR. HARRIS: It certainly calls for a hearsay conclusion.

THE COURT: That he got a report, sir, of it? I will permit that, sir.

MR. HARRIS: Well, your Honor, it is not only that he received the report, but it then tells what the nature of the report was.

THE COURT: I think if he received the report, I will permit that.

MR. HARRIS: He says of larceny.

MR. CAPUTY: The report of a larceny. I think it is proper.

THE COURT: I understand you to say you did receive a report of a larceny?

THE WITNESS: Yes, sir.

BY MR. CAPUTY:

Q. And from whom was that, sir? A. That was from Mrs. Harley, who was employed at the restaurant.

* * * * *

17 Q. After you talked to her again did you take anyone to number 11 precinct? A. Yes, I did.

Q. And who was that? A. I took a boy to Number 11 Precinct by the name of Roy.

Q. And where in Number 11 Precinct did you take him to? A. Upstairs to the detective room.

18 Q. To any detective? A. To Detective Barbour.

Q. And what did you do after that? A. I explained to him what the circumstances were.

MR. HARRIS: I object.

BY MR. CAPUTY:

Q. Well, did you leave the station? A. Yes, I did.

Q. What did you do next? A. I returned to the 2400 block of Nichols Avenue Southeast and that is when I saw Galloway.

Q. Tell us what, if anything, you saw when you saw him. A. Galloway was driving his car. I walked over to his car and I told him I would

like to speak to him. So he said, "About what?" I said, "About a coat."

He said, "Well, will you mind getting in the car while I pull around the corner?" He went over to Talbert Street, made a left turn on to Talbert Street and parked his car.

He then got out of the car and said, "Well, what's the matter, Officer Hilton?" I said, "Galloway, we got a report of a stolen coat and the lady said you were in the restaurant at the time it was missing." He said, "I didn't take no coat." At that time he lit a cigarette.

19 As we proceeded to the precinct --

Q. How did you go to the precinct? A. We walked.

Q. Tell us what, if anything, happened or was said as you were going to the precinct. A. Just before getting to the precinct Galloway stated that he was tired of the policemen picking him up every time something went wrong over there.

I said, "Well, Galloway, you shouldn't have that attitude. If you didn't do anything, you don't have anything to worry about."

At that time he started saying something about somebody killed his father and that they wasn't going to do it to him.

So I said, "Galloway, are you sick?" He said, "No. I am not sick." I said, "Well, why do you want to tell me that?" He said, "Officer Hilton, I am tired of these so-and so's picking me up every time."

I said, "Galloway, if you don't keep quiet I am going to place you under arrest for disorderly conduct." He said, "Well, forget it. My mother will get me out."

20 At that time I grabbed him in the belt and I told him he was under arrest for disorderly conduct.

Q. Did you take him in to the precinct? A. Took him straight in to the precinct.

Q. Any particular place in the precinct? A. Took him up to the detective room.

Q. And where is that? A. On the second floor.

Q. Was anyone in the detective room? A. Detective Barbour and Sergeant Gerber.

Q. Now, will you tell us what, if anything, took place in the detective room? A. As we got to the door, Galloway was still loud and boisterous. I told him to set in the chair over by the window, which he did.

At that time I called Detective Barbour over to the door, and I told him, I said, "Detective Barbour, this is one of the boys that was involved in a missing coat which was reported at Thelma's Restaurant." At that time I told him, I said, "When you finish with him, book him for disorderly conduct to me."

At that time Galloway jumped up and started saying again that these so-and-so's killed his father; he said, "I will be darned if I am going to let them kill me."

21 So Barbour said "What's wrong with him, Hilton?" I said, "I don't know what is wrong with him, Barbour."

At that time Barbour went over to him and said, "What's wrong with you, Galloway?" And that is when he swung at Officer Barbour and tore his shirt.

Q. Swung at. Did he hit him? A. It was a glancing blow, sir.

Q. Then what happened after that? A. At that time I ran into the room, grabbed Galloway and pushed him over toward the wall. I said, "What's wrong with you, Junior?"

He said, "I am tired of these so-and-so's. They killed my father; they are not going to kill me."

And at that time Officer Barbour came over again and he got hysterical again. At that time, I --

THE COURT: You mean he got--do you mean the officer or Galloway?

THE WITNESS: Galloway.

THE COURT: All right.

THE WITNESS: Galloway; yes. At that time he started struggling again. I managed to get him out in the hall, and as we got into the hall,

22 and as I turned to take him down the hall to the steps, Officer Barbour came out the door and he kicked Officer Barbour in the groin.

Officer Barbour--

BY MR. CAPUTY:

Q. Was that out in the hall or in the room? A. In the hallway; just as you are going out in the hall.

Q. As you are going out. He kicked him where, sir? A. In the groin.

Q. Then what happened? A. As we got in the hall Officer Barbour fell, and I saw him kick at him again. Now, I didn't see the kick land anywhere.

Q. Then what happened? A. At that point I got a lock on the back-- through his armpits, in the back of his neck, and I proceeded down the steps with Galloway.

Q. Prior to this time was anything done by Detective-Sergeant Gerber? A. Sergeant Gerber came out in the hallway, sir, and he tried to get Galloway's feet, and he was kicking furiously. I told Sergeant Gerber that I had him under control.

Q. Then what did you do? A. Then I proceeded down the steps with Galloway backwards.

Q. Who was backwards? A. me.

Q. Did you get down the stairs? A. Got down to the steps.

Q. What, if anything, took place when you got downstairs?

A. As we got to the first floor landing Galloway was still struggling. At that time Mr. Chase came up and I had Galloway up beside the wall.

Q. Do you know who Mr. Chase is? A. Mr. Chase works for Galloway's mother. I got him up beside the wall and I said, "Galloway, calm yourself."

He said, "Officer Hilton, I am tired of these people messing with me." At that time Chase came up and told him to calm himself.

And he told Chase the same thing he told me--"I am tired of these so-and-so's. They killed my father; they are not going to kill me."

At that time Officer Paul got up from behind the railing and that is when Galloway started again; and I grabbed hold of him again, and as

24 Officer Paul stepped off the low platform on to the floor in the precinct, he kicked Officer Paul right in the groin.

Q. And what happened to Officer Paul, if you know? A. Officer Paul was knocked out.

Q. Now, did you see Detective Barbour after that? A. I didn't see Detective Barbour until after he got into the entrance to the cell block, when he helped me with Officer Smith to put Galloway into the cell, Number 4 cell.

* * * * *

Q. When you were downstairs, did you go anywhere with Barbour? A. After the incident Officer Barbour had walked into the bathroom, and I went in there. He had taken his pants down, because he had been kicked, and he was in pain, and I saw the results of the kick.

Q. Anything else about Detective Barbour? A. He had a bruise on his face. I think it was the right side, sir.

25 Q. Anything else? A. As far as his condition?

Q. Yes. A. He seemed to be in pain.

* * * * *

BY MR. CAPUTY:

Q. In your presence did he vomit? A. He was leaning over the bowl, Mr. Caputy.

Q. Did at any time Detective Barbour or Gerber strike this man up in the detective room? A. No, sir.

Q. Did you strike him, sir? A. No, sir.

26 Q. Did anyone in your presence strike him? A. No, sir; not in my presence.

Q. Let me ask you this: You know the defendant and his family, don't you? A. Very well, sir.

Q. How long have you known them? A. Ever since I have been in Washington; four or five years.

Q. And you know his aunts too, don't you? A. Yes.

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CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Hilton, you didn't tell us what you found out about the coat that you said you were investigating? A. I later found out that the coat was taken by mistake by Mrs. Harley's sister.

Q. Taken by mistake? A. That's right.

Q. You didn't tell us that a little while ago, did you?

THE COURT: He wasn't asked that, sir.

MR. CAPUTY: No.

MR. HARRIS: Very well, your Honor.

BY MR. HARRIS:

27 Q. When did you find that out, Mr. Hilton? A. The next day.

Q. Well, as a matter of fact, Officer, you found out that this coat, Number 1, was not owned by Minnie Harley. Didn't you find that out?

A. Yes, sir, I did.

Q. And you found out that this coat was owned by Thelma Beasley, didn't you? A. That is right.

Q. And you found out that Thelma Beasley had her own coat. Didn't you find that out? A. I later found out, sir.

Q. No doubt in your mind that that was the true state of affairs?
A. Mrs. Harley explained to me that she had borrowed the coat from her sister.

Q. Now when you first talked to Mrs. Harley, you came into her restaurant, did you not, sir? A. Yes, I did.

Q. And did she at any time tell you that Robert P. Galloway, Jr., had stolen her coat, or any coat? I think you can answer that yes or no.

A. Repeat that, sir.

28 Q. Did Minnie Harley at any time tell you that this defendant Robert P. Galloway, Jr., stole her coat or her sister's coat? A. She said that he was in there at the time the coat was missing.

Q. * * * Did she ever tell you that Galloway stole any coat? A. She didn't say that he didn't or that he did. * * *

Q. Did she tell you that anybody stole the coat? A. She said that the coat was missing.

* * * * *

BY MR. HARRIS:

Q. Said the coat was missing? A. And that the coat was in there before Galloway and some other boys had entered, before they had entered the restaurant. She said when they left the restaurant the coat
29 was missing, and she identified another boy to me along with Galloway as one of the boys that was in the restaurant at the time.

Q. As a matter of fact, she identified three boys, didn't she?
A. She only identified two to me, Mr. Harris.

Q. Two? Those were the two you arrested; is that right? A. I only arrested one.

Q. * * * Well, did Minnie Harley tell you anything about Thelma Beasley? A. The next day.

Q. Not until the next day? Now, you said you went to Number 11 Precinct and you put this on the complaint book? A. That is right.

Q. Right away. Now, that isn't so, is it, Officer Hilton? A. Yes, it is.

Q. Isn't it a fact that you put that complaint on the book way after all of this disturbance had happened and the time when you were talking
30 to Randolph Chase trying to get a statement in? A. No, sir.

Q. Do you recall an officer coming up to you and asking you, "Hilton, did you put this matter on the complaint book" and you said "No; I better put it on now." A. No.

Q. You don't remember that? A. No.

Q. Now, you tell us that you arrested Galloway in the 2400 block of Nichols Avenue. Is that correct? A. I said I stopped him in the 2400 block.

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Q. At that time? A. I told him why I wanted him to go to the precinct and talk to the precinct man.

* * * * *

31 BY MR. HARRIS:

Q. Now, at that time you had already arrested Ralph Roy, hadn't

you? A. No. I didn't arrest Ralph Roy.

Q. Who arrested him? A. No one arrested him.

Q. Nobody arrested him? A. No.

Q. How did he get upstairs in that second floor room at Number 11 precinct? A. He went on his own free will.

* * * * *

32 THE COURT: Let me ask you something: Officer did you bring in Roy or ask him to come in?

THE WITNESS: Yes, sir, I did, your Honor.

THE COURT: All right. What did you do? I just want to try to find out. You did ask him to come in?

THE WITNESS: Yes, sir.

THE COURT: And he did come in?

THE WITNESS: He did; on his own free will.

MR. HARRIS: Of his own free will?

BY MR. HARRIS:

33 Q. Where was he at the time this free will was exercised to go up to Number 11, the second-story room? A. He was in the poolroom in the 2400 block of Nichols Avenue.

Q. Were you in the company of any other person at the time that you extended to him this courteous invitation? A. Miss Harley.

* * * * *

BY MR. HARRIS:

Q. What did you say to Ralph Roy? Did you say, "Come with me"? A. No. I told him what the lady had told me, and he said that he didn't take any coat. I said, "Well, you wouldn't mind talking to the precinct man?" He said "No."

Q. At that time did you believe he had stolen any coat? A. Yes, I did.

34 Q. You believed that Ralph Roy had stolen it. All right. Then a little later on you invited, or arrested, or did something with respect to Galloway. You didn't believe the two of them took the coat, did you? A. I believed that they were involved.

Q. You believed that they were involved. But did you believe at the time that Galloway had stolen the coat? Did you believe that? A. Yes, I did.

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BY MR. HARRIS:

Q. Now, what kind of coat was this? I don't think that ever was stated. A. It was a black coat with a red stripe.

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35 BY MR. HARRIS:

Q. And you didn't know what the value was, did you? A. She said it was approximately seventy-five or eighty dollars.

* * * * *

36 BY MR. HARRIS:

Q. How long did you talk to Miss Harley about the coat? A. About five or ten minutes. * * *

Q. Where did the other part of the conversation take place? A. In front of the pool room. * * *

Q. About what time of the night was it when you first talked to her, sir? A. About 9:10. Fifteen minutes after nine.

Q. About 9:10. Now, what time was it, sir, when you invited
37 Ralph Roy to come to the precinct? A. About 9:20, 25. * *

BY MR. HARRIS:

Q. How long did it take to get to the precinct? A. About five minutes. Maybe less than that, Mr. Harris.

Q. Now, when you got Roy to the precinct did you talk to him at the precinct? A. I was talking to him on the way up there.

Q. But after you arrived at the precinct you didn't talk to him? A. No; I just took him in the detective room.

Q. When you took him--you didn't take him down to the desk sergeant and place his name on the arrest book, did you? A. No, I didn't.

* * * * *

38 BY MR. HARRIS:

Q. You took him immediately to the second floor room in the Eleventh Precinct? A. That is right.

Q. What sort of a room is that? A. That is the detective room, sir.

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40

BY MR. HARRIS:

Q. Now, how long did you remain in the second floor room with Officer Barbour and with Ralph Roy? A. I didn't remain at no time. I just explained to Officer Barbour that he was one of the boys in connection with the report that we had on the missing coat.

Q. And you didn't say to Officer Barbour that you were going to charge Ralph Roy with stealing a coat? A. No. I left that entirely up to Officer Barbour.

Q. And you left immediately? A. Yes; after I finished talking to Officer Barbour.

41 Q. Now, you left for the purpose of bringing in Robert P. Galloway, didn't you? A. No. I didn't leave for that purpose.

Q. You did not? A. No.

Q. Well, when you came across young Galloway, didn't you tell him that you had to bring him into the precinct? A. No, I didn't tell him that. * * *

Q. Did you tell him that anybody wanted to talk to him at the precinct? A. I told Galloway that a coat was missing and that he was involved, and he stated that he didn't take any coat. I said, "Well, you wouldn't mind talking to the precinct man?" He said, "No, I don't mind talking to nobody because I did not take no coat." That is what Galloway said to me. And then he parked his car and we both got out of the car and proceeded to Number 11 Precinct.

Q. What happened to Randolph Chase? A. Randolph Chase was in the car. I left him.

Q. He got out at some stage of the proceedings, did he not, sir?
A. He didn't get out while I got out. He stayed in the car.

42

Q. You left him in the automobile? A. When I got out he was still

in the automobile.

Q. And did you hear Robert Galloway say anything to Chase? A. No; I don't think so.

Q. You didn't hear him say "Go and tell mama this man is taking me to the precinct"? A. No. I didn't hear him say that. * * *

Q. While you were walking from Talbert Street along Nichols Avenue, it would be one block to the next corner, with the defendant, on your way to the precinct, -- did you see the brother of this defendant, a little boy named Ronald Galloway? You know him, too, don't you? A. Yes, sir.

Q. Did you see Ronald? A. I believe Ronnie passed in his car.

Q. That is right. Now, did you hear any conversation between
43 Ronnie Galloway and this defendant Robert P. Galloway? A. He told him to go tell mama he is down at the precinct.

Q. And what did Ronnie say when he told him to go and tell mama that "I will be down at the precinct?" A. Well, Ronnie proceeded on down Nichols Avenue.

Q. And did that conversation take place about midway of the block? A. Yes; just a little prior, a little before midway of the block. Just as we entered the service station.

Q. About one-third past Talbert Street? A. That is right, sir.

Q. Now, when you got to the precinct and you walked in, who went in first--you or Galloway? A. Galloway.

Q. And you were behind Galloway, were you not, sir? A. Yes. I had him by the belt.

* * * * *

44 Q. Now, when you brought Junior Galloway by the belt up to the second story room, did you say anything to any of the officers or the first officer? A. No.

Q. Did you go to the desk and do anything with respect to an arrest book? A. Did I? No, sir.

Q. Did you make any attempt at that time to place the name Robert P. Galloway, Jr. on the arrest book of Number 11 Precinct? A. He was

raising so much cain I couldn't get him over there without a struggle. There was two ladies standing in the precinct at the time and he came in --

Q. So there would be less of a struggle upstairs you figured? A. Less than a struggle?

Q. Yes, sir. A. Well, it was. He went up there freely.

Q. What? A. He went up there freely; without a struggle.

45 Q. He went up there freely. But, if you had taken him to the desk, he was going to struggle; is that so? A. The way that he was cursing, I didn't want him over there at the book where the ladies were standing.

* * * * *

Q. But nevertheless you did not put his name on the arrest book? A. Not immediately, no.

Q. Not immediately. His name wasn't put on the book until five or six hours later; isn't that so? A. That is not true.

Q. When was his name put on the arrest book? A. 9:55.

Q. At 9:55. And who put his name on the arrest book? A. The Clerk. The Station Clerk. * * *

Q. At your direction? A. That is right.

46 Q. Now, when you make an arrest, sir, is it not your duty to immediately place the name of the arrested person on the arrest book? A. Is it not my duty?

Q. Yes, sir. A. No; it is not my duty.

Q. Well, is it your duty to present your prisoner for the purpose of having him booked, as you term it? A. That is the general policy.

Q. Sir? A. That is the general policy, sir.

Q. That is the general policy; and that is the general rule, isn't it, sir? A. Yes.

Q. And you didn't comply with that rule on this particular occasion? A. No, sir; but I informed Officer Barbour--

* * * * *

47 Q. Now, what was your purpose--tell these ladies and gentlemen of the jury why you brought him up to the second-story room in the first

place. * * * A. I told you we had a report of a missing coat, which was reported by Mrs. Harley. She stated that Galloway, and the Roy boy, was one of the boys that was in the restaurant at the time the coat was missing, and that she suspected one of the boys had taken the coat.

Q. You say she suspected? A. Yes.

Q. And that was the reason why you brought him upstairs? A. To talk to the precinct man; yes.

Q. To talk to him? A. Yes, sir.

Q. And you were going to make an effort, and your cohorts and fellow officers were going to make an effort to see if you could find out who, if anyone, had stolen the coat; that is correct, isn't it? A. Yes, sir.

48 Q. And you didn't take him up there and book him for disorderly conduct, did you? A. I had placed him under arrest for disorderly conduct before going upstairs.

Q. * * * I asked you did you take him up to the second-story room for the purpose of booking him for disorderly conduct. A. No.

Q. You took him up there so that these three gentlemen could interrogate him concerning--

THE COURT: Now, he said there are two, Mr. Harris.

MR. HARRIS: The two other gentlemen, and yourself--the two gentlemen and yourself--could interrogate this defendant about the coat?

THE WITNESS: Yes, sir.

* * * * *

BY MR. HARRIS:

50 Q. And so that when you entered the precinct by the side door, it is only a matter of three or four steps to these steps leading upstairs; is that correct? A. After you enter the second door, yes, sir.

Q. Now, did you hesitate or pause during those three or four steps, after having come into the side door, before proceeding up the stairs to the second floor? A. Did I pause any?

Q. Yes. A. No, I didn't.

Q. Now, as a matter of fact, had you looked from that particular

position toward the counter where the arrest book was; you couldn't have seen it, could you? A. Yes, I could.

* * * * *

BY MR. HARRIS:

51 Q. Now, what time was it when you first talked to Robert Galloway, Jr.? A. It was approximately 9:40; 9:35.

* * * * *

MR. HARRIS: * * * I am asking him now with respect to Robert Galloway, how long.

52 THE COURT: He answered that. You said five minutes or less, didn't you, Officer?

THE WITNESS: Yes; that is right.

BY MR. HARRIS:

Q. So that when you came back after having invited and brought Mr. Young Roy in, how soon was it after that that you saw Robert P. Galloway, Jr.? A. It was immediately after I got back into the 2400 block of Nichols Avenue.

Q. You hadn't left the precinct more than a very few minutes? A. That is right.

* * * * *

53 BY MR. HARRIS:

Q. Now, I will ask you, sir, if Thelma Harley in the night time came to the precinct and said to any person that "My coat has been stolen" or "My sister's coat has been stolen"? A. I never--I never talked to Thelma Harley, Mr. Harris. * * *

54 Q. All right. Did Minnie Harley ever come to the precinct on that night at or about 9 or 9:10 or before that time, and say to you or say to any other police officer, "My coat has been stolen", or "A coat has been stolen"? A. She didn't have to, because I was already in the 2400 block of Nichols Avenue. She stopped me and told me.

Q. She stopped you? Didn't you come into the restaurant? A. Yes. I came into the restaurant, and she came over to me.

Q. And she then told you about it? A. That is right.

Q. Told you that the coat was missing? A. Her coat was missing.

Q. Didn't say that it was stolen? A. No.

* * * * *

55 Q. From the time that you got Galloway into the precinct house and ushered him to the second floor, to the time that you got him into the cell block and locked him up; that took less than fifteen minutes, did it?

A. From the time we entered the precinct?

Q. Yes, sir. A. It was approximately twenty, or fifteen minutes.

* * * * *

57 Q. In other words, when you brought Galloway in, the sergeant continued to type and said, "Be seated by the window" and Galloway was seated? A. That is right.

Q. You then left Galloway? A. Yes, sir.

Q. And then you went outside in the hallway? A. With the room still in view.

Q. And Detective Barbour came outside with you, did he? A. He came to the doorway leading to the hallway.

Q. And you and Barbour engaged in some type of conversation, I suppose? A. Yes.

Q. And your purpose in going outside was to talk to Barbour concerning Galloway? A. Yes.

58 Q. Then there came a time when you came back into this room that you call the detective room? A. Yes, sir.

Q. Where was Barbour when you came back into the room? A. Officer Barbour was over by the chair where Galloway was sitting.

Q. And was he standing or was he sitting? A. Who?

Q. Officer Barbour. A. He was standing.

Q. And Galloway was seated? A. That is right.

Q. And Sergeant Gerber was still at another place, seated at the typewriter? A. That is right.

* * * * *

59 THE COURT: He has already testified that he returned to the detective room and that Barbour was standing by the chair in which the

defendant was sitting, and Sergeant Gerber was typing.

BY MR. HARRIS:

Q. Now, at that time that his Honor just related to you, where did you go? A. At that time, that's when Galloway stated--

Q. No. I am asking you where did you go? A. I came back into the room.

Q. And where did you stand? A. I stood between Galloway and Officer Barbour. * * *

BY MR. HARRIS:

Q. Now, when you came, at that time did you see Barbour strike Galloway? A. No. No.

Q. And when you came in between them Galloway was still in his
60 seat and Barbour was still standing over him? A. Galloway was coming out of his seat. That is when he struck at Officer Barbour, and Officer Barbour said, "What's wrong with you?"

Q. He was coming out of the seat? A. Yes.

Q. About how far away from Galloway was Barbour standing? A. About three feet.

* * * * *

BY MR. HARRIS:

Q. Now let me ask you, Private Hilton, why did you come back into the room in the first instance? A. Because Galloway started hollering, "Officer Hilton, these white so-and-so's killed my father. They are not going to kill me."

61 Q. And you heard him screaming and hollering? A. That is right.

Q. And did you suspect that Officer Barbour had assaulted Galloway? A. No; because I was standing in full view of them. Officer Barbour didn't do anything but ask him what was wrong with him, and that's when--

Q. You heard the screams and you rushed back into the room? A. That is right. * * *

BY MR. HARRIS:

Q. Now, when you rushed back into the room Galloway, of course, was still in his seat? A. That is right.

Q. And you don't say that he had struck Officer Barbour at any time before you got into the room, do you? A. Just as I got to Galloway, that is when he leaped out of the chair and swung at Officer Barbour and tore his shirt.

* * * * *

62 BY MR. HARRIS:

Q. And did there come a time when Officer Gerber arose from his seat at the typewriter? A. Yes.

Q. And about what time was that, sir? A. After I had taken Galloway and pushed him over to the wall and told him to calm himself.

Q. Now, did you notice Galloway's mouth at that time? A. No, I didn't.

Q. Incidentally, you snatched his glasses off, didn't you? A. No, I didn't.

* * * * *

63 BY MR. HARRIS:

Q. Do you know whether or not he had glasses on? A. Yes, he did.

Q. On this occasion? A. Yes, he had glasses on.

Q. And do you know whether or not those glasses remained on him throughout all these proceedings that you tell us about? A. No, they didn't.

Q. How did they come off? A. In the scuffle.

Q. In what scuffle? A. After he swung at Officer Barbour and I placed him along the wall, he started up again, and that's when I grabbed him. I grabbed him by the neck and pulled him out to the hallway, and after we got downstairs then I noticed that his glasses wasn't on him. And I came back upstairs and found his glasses under the locker.

* * * * *

64 Q. Now you say at some stage in these proceedings you grabbed this defendant and you grabbed him from the rear, did you not? A. That is right.

Q. And you sort of grabbed him under his arms-- A. Behind his neck.

Q. And behind his neck. A. That is right.

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65

BY MR. HARRIS:

Q. What is your weight, Officer? A. At that time I was weighing about 186.

Q. And you were in good health and strength on that day, were you not, sir? A. I presume so, sir.

Q. And on that time you knew or you later found out that Galloway was 18 years old, didn't you? A. I knew all the time that he was 18.

Q. Now, let me ask you, Officer Hilton: Sergeant Gerber, who was in the room, had his pistol, did he not? A. I can't answer that.

THE COURT: Can't we assume all officers have their pistols? It is a duty that requires them to have their pistols at all times.

* * * * *

66

BY MR. HARRIS:

Q. Now, Officer, this arm hold lock that you had on young Galloway--
67 did you immediately proceed to drag him down the steps? A. No.

Q. Well, how long did you hold him in that position before anything else took place? A. How long?

Q. Yes, sir. A. Long enough to get him out of the room and down to the first floor of the precinct, sir.

Q. Well, my question is, when you first grabbed him did you immediately start, proceeding to drag him out of the room? A. No; not under--no. When I first grabbed him I didn't have that lock on him. I just had him--I had both of my hands in his chest holding him along the wall of the detective room. At that time he seemed to quiet down. Then Officer Barbour came over again. Then he started up again. Then that is when I grabbed that hold on him from the rear, and I pulled him out into the hallway and he started kicking me. Then Sergeant Gerber came out.

Q. And he was screaming at that time, too, wasn't he? A. Yes, he was.

68

Q. Then you proceeded to drag him down the steps? A. That is

right.

Q. And while you were dragging him down the steps, where was Officer Barbour? A. Officer Barbour was on the floor. He had kicked him in the groin.

Q. Then there came a time when you got down to the first floor of the precinct, Officer? A. That is right.

Q. Now, the boy was still kicking and screaming at that time? A. Yes.

Q. When you first got to the ground floor? A. Yes. And then he calmed down.

Q. Now, then there came a time, while he was still kicking, that Officer Paul rushed over. Isn't that so? A. He had calmed down first. Then Mr. Chase came over and said, "Junior, get ahold of yourself."

* * * * *

69 THE COURT: Did Officer Paul come over, sir?

THE WITNESS: He came over to assist me.

THE COURT: All right, sir. How did he come?

THE WITNESS: It was in a hurry.

THE COURT: Did he walk or run, or what, sir?

THE WITNESS: It was in a hurried manner. It wasn't a run or a walk, your Honor.

BY MR. HARRIS:

70 Q. And he came from behind the rail, did he not? A. That is right.

Q. And Galloway was still kicking up and down at that time? A. Yes. That is when he came from behind the rail.

Q. And Officer Paul attempted to grab the feet of Galloway; isn't that correct? A. I couldn't say truthfully. * * *

Q. You don't know? A. All I know is that when I grabbed Galloway he started kicking, and when Officer Paul came over, he kicked Officer Paul right in the groin. He was making no effort to grab his feet.

Q. Officer Paul wasn't trying to grab his feet? A. No.

Q. But there is no doubt in your mind you still had the lock that you demonstrated on him at that time? A. Yes, sir.

Q. He couldn't use his hands at all, and you had him also so his neck was pinned? A. That is right.

Q. He was kicking before Officer Paul got over, wasn't he? A.
71 Before Officer Paul came over?

Q. Yes, sir. A. Yes.

* * * * *

BY MR. HARRIS:

Q. Now, after that occurred did you take Galloway back to the cell block? A. Yes, sir.

Q. Now, by that time Officer Barbour came down to assist you to put him in the cell, you said. A. Yes. As I entered the cell block that
72 is when I saw Officer Barbour.

Q. Now you saw Officer Barbour draw his gun and threaten to shoot this defendant, didn't you? A. No, sir.

Q. You didn't see that. A. No, sir.

Q. Did you hear Officer Barbour say "I will kill the little so-and-so"? A. No, sir.

* * * * *

74 BY MR. HARRIS:

Q. At the time that you and Barbour put Galloway into the cell block,
75 did you notice his face at that time? A. Yes.

Q. And what was the condition of his face? A. It was the same as it was when he entered the cell block, except for his lip.

Q. His lip was split? A. No; it wasn't split.

Q. But it was cut; some abrasion or laceration of the lip? A. A little abrasion on his lip, yes.

Q. When you first arrested him or took him into custody that wasn't there, was it? A. No, sir; not to my knowledge.

Q. Do you know how it got there? A. Possibly in the struggle, Mr. Harris.

Q. Now, was the side of his face swollen? A. No, sir.

Q. Well, now, there came a time when Galloway was taken to the hospital. Were you there then? A. Yes.

* * * * *

76 Q. Do you know why he was taken to the hospital? A. Yes.

Q. Why was that, sir? A. He complained of his hip. He said his hip was hurting.

* * * * *

80 REDIRECT EXAMINATION

BY MR. CAPUTY:

Q. You were asked about whether the defendant Galloway complained of any injuries, and particularly about a hip injury. Now, of your own personal knowledge, having known the defendant and his family, do you know if he had anything wrong with his hip prior to this day? A. Yes, I do.

Q. And what was wrong with it? Do you know? A. I am not quite sure if it was a broken hip or fractured hip that he had prior to--

Q. Prior to March the 11th? A. Yes, sir.

MR. CAPUTY: That is all.

* * * * *

81 JOHN R. O'BRYEN

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DIRECT EXAMINATION

* * * * *

BY MR. CAPUTY:

Q. And what was your assignment, sir, on March 11, 1955? A. Station clerk, sir.

* * * * *

82 BY MR. CAPUTY:

Q. Now, directing your attention to March 11th, 1955, did you see the defendant Galloway? A. I did, sir.

Q. And what time was it? A. It was approximately 9:50 p.m.

Q. Was he with anyone? A. Yes, sir.

Q. Would you tell us about it? A. I was sitting in my desk and I noticed the rear door directly opposite me open, and Mr. Galloway and

83 Officer Hilton came through the door. They proceeded upstairs.

Q. Now, as they came through the door, was it quiet? Was anything said by anyone? A. Yes; I noticed that Mr. Galloway was quite agitated and used curse words, directing them to Private Hilton.

Q. Now, you say they proceeded upstairs? A. Yes, sir.

Q. And where were you at this time? A. I was sitting in behind the station clerk's desk and office.

Q. Now, after they went upstairs, Officer Hilton and the defendant Galloway, did you hear anything? A. Not for, oh, ten minutes.

Q. Then what, if anything, did you hear? A. Heard a scuffling noise at the head of the stairs.

Q. Then did you see anyone? A. Yes, sir. I saw Officer Hilton and Galloway come tumbling down the stairs.

Q. What do you mean "come tumbling down the stairs"? A. Well, Officer Hilton, to the best of my recollection, was in front with his arms around Mr. Galloway, more or less dragging him down.

Q. And how was Officer Hilton coming down the stairs? A. Well,
84 Officer Hilton--seems to me Officer Hilton more or less lost his balance in trying to--

Q. No. My question was how was he coming down--frontwards or backwards? A. Oh; backwards.

Q. Did you see them after they came downstairs? A. I did, sir.

Q. Now, will you tell us what, if anything, you heard and observed? A. Well, there was loud words, cursing. When they got to the bottom of the stairs, they started towards the front of the office. When they got approximately five feet from the bottom of the stairs Mr. Galloway broke loose from Hilton and at the same time Officer Paul, who was sitting at the switchboard, got up and started through the little gate that separates the office from the corridor. As Officer Hilton reached for Galloway, he caught him around the chest. At that moment Officer Paul came through the entrance, and as Private Hilton seized Galloway, Galloway left the floor and caught Private Paul in the groin. Private Paul hit the floor.

Q. And what, if anything, happened? A. Well, when he hit the floor, well, Officer Hilton then immediately got a-hold of Galloway and

Officer Smith went to his assistance, and I went over to see--Paul was
85 laying on the floor, and it looked to me like he was in a state of shock,
so I went over to the switchboard and called an ambulance.

Q. And did the ambulance come? A. Yes, sir; I called the Fire
Board and then they sent an ambulance. It was there within minutes.

Q. Was Private Paul removed from the station? A. Yes, sir.
I--I don't know who helped me, but I know I assisted Private Paul to his
feet. I don't believe he remembers it, but he half-walked and I half-
carried him into the Sergeant's room, and he sat down in a chair there.

Q. Did you notice anything about Private Paul's uniform? A. Yes,
sir. I noticed a footprint in the upper part of the thing.

* * * * *

BY MR. CAPUTY:

Q. Now, did you see Detective Barbour? A. Yes, sir. He came
down the stairs immediately after Officer Hilton and Galloway came down.

Q. Were you in a position to see Detective Barbour's face? A. I
86 was, because in all the excitement I got up from the desk and came around
the switchboard and I was standing, oh, approximately five feet from the
little gate; that's the entrance to the office; and Officer Barbour was
standing, oh, I should say from five to eight feet from him.

Q. Did you observe his face? A. I did.

Q. Did you notice anything on it? A. Yes, sir. He had a contu-
sion, oh, I believe it was right at the-- And I asked him, I said, "Barbour,
what in the hell happened to you?"

Q. No. Don't go into that. Well, were you in a position to see the
defendant Galloway? A. Yes, sir.

Q. Were any marks or bruises on his face? A. Not to my knowl-
edge. Didn't see any. * * *

CROSS EXAMINATION

BY MR. HARRIS:

* * * * *

87 Q. And what were your duties on that particular night, sir? A. My
duties were to answer the telephone and book prisoners. * * *

88 Q. What time did you book Galloway? A. I am not too certain.
It was in the vicinity of 10:30.

Q. And where was Galloway at 10:30? A. In the cell block.

* * * * *

89 Q. Did you hear him say anything about people were trying to kill
90 him? A. I heard him say something to the nature--something that the
police had killed his father and now they were trying to kill him, I believe;
something of that nature.

* * * * *

91 Q. Now, when Officer Hilton first got Galloway on the first floor,
did you see Galloway kicking up and down? A. Before he kicked Officer
Paul?

Q. Yes, sir. A. He was struggling, trying to get away.

* * * * *

92 Q. Did Randolph Chase come in after Galloway had been taken up-
stairs and inquire of you whether or not Galloway was there? A. Mr.
93 Chase came in the station. I don't recollect that he asked me. I do re-
member that he asked and was told. Now, whether I told him or whether
one of the other boys that was working with me told him, I can't say.

* * * * *

REDIRECT EXAMINATION

BY MR. CAPUTY:

Q. In answer to Mr. Harris' question you stated that you were the
one that booked the defendant Galloway? A. That is right; yes, sir.

Q. Did you make the entries yourself in that book? A. I did, sir.

Q. And in answer to Mr. Harris' question you say that it is your
recollection it was about 10:30? A. In that vicinity. I would say a few
minutes later than 10:30.

* * * * *

MR. CAPUTY: Would you get that book, please, for me, from
whoever has got it?

(The Marshal stepped out and returned with large book.)

* * * * *

94 BY MR. CAPUTY:

Q. Is that the book there where you keep a record of arrests, or booking of an individual, if he is brought to the station? A. That is right, sir.

Q. Now, will you turn to March 11th, 1955? A. I have it, sir.

* * * * *

Q. What time does it show that the defendant Galloway was booked?

95 A. 9:55. * * *

Q. Now, when you testified that it was 10:30 or later, were you in error then? A. I was in error. * * *

RECROSS EXAMINATION

BY MR. HARRIS:

* * * * *

Q. Now when did you find out the birth date of Galloway? A. That
96 is something that I couldn't tell you, sir. I don't recollect.

Q. You didn't find it out at the time that you made that entry, did you? A. That is something else I couldn't recollect.

Q. And when you booked Galloway he was back in the cell block, wasn't he? A. Yes, sir.

Q. And did you ever ask him the date of his birth? A. No, sir. To the best of my recollection--well, I don't know. I might have gotten it from the statement of fact; I might have gotten it from perhaps the officers asking him back in the cell block. I don't know.

* * * * *

97 FURTHER REDIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

98 Q. Let me ask you this: At the time that you booked Galloway, where was Private Hilton? A. At my side.

Q. In your presence? A. Yes, sir.

Q. And how did you place the time on there, sir? Where did you get the time you have shown on there, 9:55? A. From the clock directly in front of me.

* * * * *

103 ANDREW J. GERBER

* * * * *

104 DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and assignment, sir? A. Andrew J. Gerber, Detective-Sergeant attached to Police Headquarters, detailed to the 11th Precinct.

* * * * *

Q. Directing your attention, sir, to March 11th, 1955, did you see
105 Robert Galloway? A. I did.

Q. And what time and where? A. It was shortly before ten P. M. on the 11th of March, Friday night, in the detective's office, which is on the second floor of Number 11 Precinct, on the west side of the building.

Q. When you saw him on that day, was anyone with him when you saw him? A. Yes, sir. Private Hilton of the 11th Precinct was with him.

Q. Did you see him in the detective room did you say? A. Yes, sir.

Q. Was any other officer, other than Private Hilton, in the detective room, sir? A. Barbour was in there. He and I were in the room together.

Q. And just whereabouts in the room were you and Detective Barbour? A. I was seated behind the desk at a typewriter when Hilton entered the room with Galloway. Private Barbour was sitting in a chair just across the desk from me.

Q. Now will you tell us what, if anything, took place shortly after
106 you saw the defendant Galloway come into the detective room with Private Hilton? A. Private Galloway was told to have a seat by the window, which was directly behind me. I was facing the wall.

Q. You mean the defendant Galloway and not Private Galloway? A. That is right. And Hilton was explaining a case to Private Barbour and they were standing about at the doorway. Hilton was about right in the doorway; Barbour was just inside of the room of the doorway. The defendant Galloway was in kind of an ugly mood. He was cursing and

carrying on, damning the police for always picking on him when anything happened. A few minutes after that; well, it was shortly after that outbreak that Barbour turned around and told him "Be quiet". He says "Until I get the man's story here." And I turned around and told him, "Let's calm down here until we get the facts in the case." And he continued with his cursing and carrying on. Suddenly he lunged up and said, "You white" some obscene words there, "You killed my father but you are not going to kill me"; and with that he struck Barbour who had turned around at that time, pushing him over towards the wall to an adjoining
107 room.

Q. Whereabouts was the detective, Barbour, struck--what part of his body? A. He was struck in the face first.

Q. Did you see that, sir? A. Well, I just saw them as both of them went towards the wall. I could hear the lick.

Q. Then what took place after that? A. Private Hilton, who was standing in the doorway, came over there and grabbed Galloway around the shoulders and pulled him back. As he grabbed him back, Private Barbour's shirt was torn, because Galloway had a hold of his shirt right here, and started taking him out of the room. And he got just about at the threshold when Private Barbour went over to assist Hilton, and Galloway, his arms were flailing, his legs were kicking up, and he kicked Barbour in the groin. Barbour fell to the floor right about at the doorway and as he went down, Galloway kicked him in the face.

Q. Do you recall what side of the face, sir? A. I think that it was the right side of the face. Right up on his cheekbone here. It was kind of just about like a brush burn. It was skin scratched and a little swelling starting.

108 Q. Then what happened after that? A. I stepped over Barbour while he was down there, grabbed a hold of Galloway's leg when he kicked up again. I believe I grabbed his left leg, and as he tried to kick with his right leg I stood on that one with my one foot. I stomped my foot down on it, twisted his leg until Hilton told me he had a good hold on him and he went back down the hallway to take him downstairs. And I walked over to

the steps. Hilton had him and Hilton went down the steps backwards with Galloway in his arms and Galloway's feet hitting on the steps as they were going down.

Q. And where was Detective Barbour at this time? A. Barbour had gotten up and came over there as Hilton went down the stairs. I think he got to the first landing when Barbour was at the top and said he was going down. About that time the phone rang in my office and I went back in there, and that was the end of my experience.

Q. Do you know whether the defendant Galloway was wearing glasses at the time? A. He was. When he came in he was wearing glasses. As he was being taken down the hall he didn't have his glasses. I think after-- a short time after he had been taken downstairs someone came up and
109 asked about his glasses and we looked around and they were right in the corner behind the door under--just a few inches underneath a locker. Apparently in the initial stage, when he had struck Barbour, his glasses apparently must have went off. * * * They were horn-rimmed glasses. Similar to the ones he is wearing now.

Q. Now, did Detective Barbour, in your presence, at any time strike this defendant? A. No, sir.

Q. Did you, sir? A. No, sir.

Q. Did Private Hilton strike him? A. No, sir. He grabbed a-hold of him from the back and pulled him right back.

* * * * *

111 CROSS EXAMINATION

BY MR. HARRIS:

* * * * *

112 Q. Now, when Barbour and Hilton were talking, they were talking at the doorway? A. That is right.

Q. Now, did there come a time when Barbour came out of the doorway and back into the room? A. Well, Barbour was always in the room.

Q. Well, how far was he from Hilton? A. A foot or so. I mean they were speaking, kind of confidential-like. I mean, one was--I would say Hilton was standing right on the threshold, or thereabouts. Barbour

was in our room. I would say maybe a foot or two foot. Two feet.

Q. Did you know what they were talking about? A. Yes.

Q. Now, did Barbour then move back further into the room? A. Yes. He came back at one time to tell him to be quiet, that he could hardly hear Hilton.

Q. And he went back with Hilton? A. He went back a little ways and Hilton probably came in so they could go ahead and talk.

Q. Not what probably happened. Tell us to your best recollection. Did Barbour go back inside or further into the room? A. I don't under-
113 stand the question.

Q. Well, -- A. At what time?

Q. Well, when he left the threshold and you said he returned to say something to Galloway-- A. Well, he just turned around and took a couple steps. I would say he came to about the center of the desk. It would be probably three or four feet.

Q. Did he go toward Hilton after that happened? A. He turned around to go toward Hilton again; yes; continued going toward Hilton.

Q. Did he go toward Hilton after that happened? A. I would say yes; took a step or two.

Q. Barbour turned to Galloway the second time, did he not? A. No; Barbour turned around as Galloway lunged from his chair. When he got up out of his chair his chair hit the back and of course it made a noise. That was the time that I looked around to see what was the cause of that noise, and Barbour turned around and that is when Galloway struck him, as Barbour turned around.

Q. Well, now, when Barbour and Hilton were talking confidentially, as you say, at the threshold, how far away was Galloway at that time?
114 A. From Barbour? I would say ten or eleven feet; the room, now, is just 12x12.

Q. Well, didn't Barbour come back toward Galloway? A. That is right. He turned around and took two steps or so towards him and told him, "Look; be quiet."

Q. And then after that he went to talk to Hilton some more? A. He

turned around to talk to Hilton some more. Now, Hilton may have taken a step in, or two, to keep Barbour from walking back that far probably.

Q. And Barbour walked back the second time toward Galloway?

A. No. As the noise, the chair, when he lunged out of his chair, the chair hit the wall and he, I believe, turned around to see what it was. Galloway struck him.

Q. And of course he did not move from his position? He hadn't moved, too, from his position? A. Galloway moved him from his position.

* * * * *

116 Q. And you were typing? A. That is right.

THE COURT: Now, Mr. Harris, you say "all this time." I understood the officer to state that when the chair hit the thing, he turned. He wasn't typing then. Is that right, officer?

THE WITNESS: That is right.

BY MR. HARRIS:

Q. Then did you immediately get up, sir? A. Well, I was facing the wall with my back towards them. I had to turn my chair around and went over there. Of course, Hilton was the one went in and got a-hold of him as he got Barbour against the wall.

Q. Now, what sort of a hold did he get on Galloway at that time?

A. He got him from the back. Put his hands around in back of him this way.

Q. With his hands behind his neck? A. No; not at that time. At that time he had him either on the outside of the shoulders or under the shoulder, and took him back out of the room into the hallway.

117 Q. Now, you say you didn't see Barbour strike this man in the face? A. No, sir.

Q. And you did not see Hilton take Galloway's glasses off? A. No, sir. * * *

Q. Did you hear this defendant scream? At any time? A. He was doing a lot of cursing and loud talking. I wouldn't say he was quite to the screaming point.

* * * * *

Q. Did you hear him cry out, "Officer Hilton, these people are about to kill me in here"? A. No. The only thing that I heard along that line would be when he said that "You white so-and-so's killed my father but you ain't going to kill me."

* * * * *

119 Q. Did you see Hilton drag Galloway down the steps? A. Yes, sir.

Q. Did you strike Galloway at any time? A. No, sir. I stepped on his foot. I twisted his left leg.

Q. But you didn't hit him? A. No, sir. I held him until Hilton got a better hold on him. He told me, "I got a good hold" and he went on backwards and went on down the stairs.

* * * * *

120 Q. And you know that Hilton brought this defendant up to the second-story room to do some questioning about an alleged stolen coat? A. That is right.

Q. And did you hear this defendant say to Barbour, or to you, that he didn't know anything about any stolen coat? A. That is right.

* * * * *

BY MR. HARRIS:

Q. As far as you know, that was Hilton's own idea? A. Let's see. I don't know jut how to answer that.

THE COURT: Let me ask you this--

THE WITNESS: I know the reason why, but it wasn't until the man was brought in. I mean, we knew nothing about the report until Hilton came there with Galloway.

* * * * *

123 JOHN B. PAUL

* * * * *

124 DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and assignment, sir? A. Private John B. Paul. Assigned to the 11th Precinct.

* * * * *

Q. Do you know one today by the name of Robert P. Galloway?

A. Yes, sir.

Q. I direct your attention to March 11th, 1955. Did you see him on that day? A. Yes, sir.

125 Q. And what time was it that you first saw him? A. It was approximately 9:50 p. m.

Q. Was anyone with him at the time? A. Yes, sir.

Q. Who? A. Officer Hilton of Number 11.

Q. And where were they when you saw the defendant and Private Hilton? A. They came in the back door of the precinct.

Q. Do you know where they went? A. They proceeded upstairs to the second floor.

Q. And after that, did you hear anything, sir? A. It was about a few minutes later I heard a scuffling, like it was a fight, coming from the second floor. * * *

Q. Did you do anything at that time? A. I stayed where I was until I observed Officer Hilton and Galloway coming down.

Q. Tell us what you observed. A. They were coming down these steps from the second floor to the first floor.

Q. How were they coming down? A. Officer Hilton was coming
126 down the steps backwards and he had an arm-hold on Galloway, and Galloway was fighting to attempt to get away.

Q. Now, do you know one Randolph Chase? A. Yes, sir.

Q. Did you see him at Number 11 Precinct? A. Yes, sir.

Q. And where was it that you saw him; just whereabouts in the 11th Precinct that you saw him? A. I saw him as I went to Officer Hilton's assistance. That is the first time I saw Chase.

* * * * *

THE WITNESS: Who; Chase?

THE COURT: Chase. You say Chase went somewhere?

127 THE WITNESS: He went over to where Hilton and Galloway were, sir. * * *

BY MR. CAPUTY:

Q. And at that time where were you? A. I had come from around the railing in the office part, to the little aisleway at the foot of the stairs.

Q. Now, how many steps did you take from the railing? A. Approximately two.

Q. What happened then? A. I proceeded to get Chase back from where Officer Hilton and Galloway were. I did not know his intentions, whether they were friendly or hostile. * * *

BY MR. CAPUTY:

Q. Tell us what you did. A. And I pulled him back, and Galloway started kicking, and I received one kick in the groin.

Q. And what happened to you? A. And as I fell forward I got kicked in the stomach and I fell back to the floor.

Q. And what happened to you? A. So I went unconscious.

128 Q. Now, there came a time that you came to? A. Yes, sir.

Q. And where, if anywhere, did you go? A. When I came to I was in the sergeant's room.

Q. Were you taken anywhere? A. I was taken to Emergency Hospital.

Q. How? A. By the Fire Department ambulance.

Q. And how long did you stay at the Emergency Hospital? A. I was released from the hospital on March the 14th.

Q. Can you tell us what, if anything, they did for you at Emergency Hospital? A. I was examined and put to bed, and given a pill, and I had periodic examinations there at the hospital.

Q. After you left the hospital did you receive any other treatment? A. Yes. I reported to the police and fire clinic.

Q. And how many times did you report there? A. The exact dates I don't know.

Q. Well, not the exact dates. How many times did you go? A. Approximately six. * * *

THE COURT: Can you approximate the time of your return, sir?

129 THE WITNESS: Approximately the 27th of March.

THE COURT: All right.

BY MR. CAPUTY:

Q. Now, prior to the time that you had been kicked, had you struck him or laid your hands upon the defendant Galloway? A. No, sir. * * *

Q. You were in uniform at the time? A. Yes, sir.

Q. And you were in the performance of your official duties at the station there? * * *

THE WITNESS: Yes, sir. * * *

CROSS EXAMINATION

BY MR. HARRIS:

Q. Now, Officer Paul, how long was it after you saw Hilton and
130 Galloway come down the stairs, that you left your seat and came from behind the railing? A. When they came downstairs, sir. Just a minute or two minutes.

Q. One minute later. Now, Hilton came down backwards dragging Galloway in front of him. Is that the way they came down? A. That is correct.

Q. Sir? A. Yes, sir.

Q. Now, when they reached the first floor level, Galloway was kicking, wasn't he? A. Yes, sir.

Q. And as a matter of fact he continued to kick? A. For a period.

Q. And you then rushed up to seize his legs, didn't you? A. No, sir.

Q. Well, what part of his body were you going to grab? A. I went to get Chase.

Q. No. When you came to Galloway, didn't you go to grab Galloway?
A. I went there at first to get Chase away.

Q. Well, now, didn't you testify, officer, that you said you were going to Hilton's assistance? A. Yes, sir.

131 Q. Now, how did you propose to assist Hilton? A. By keeping anyone from interfering.

Q. Did you hear Chase say anything? A. No, sir.

Q. Did you see him do anything? A. He was approaching the

officer and the prisoner.

Q. And you only went over to talk to Chase? A. I went over to remove Chase, sir.

Q. And Chase moved away willingly, did he? A. I pulled him back.

Q. You pulled Chase back? A. Yes, sir.

Q. Then did there come a time when you went to do any pulling on Galloway? A. No, sir.

Q. And you had no intention whatsoever of laying your hands on Galloway, did you? A. No, sir.

Q. Well, how did it happen, sir, that you came within his vicinity?
A. The closest I came to him is approximately the length of the legs where I received my kicks from.

Q. And of course you were facing him at that time, weren't you, sir?

132 A. That is right, sir.

Q. You were kicked in front, in the front? A. That is right.

Q. And where was Chase standing at that time? A. He was behind me.

Q. And you had then turned away from Chase and were facing Galloway, weren't you, sir? A. Yes, sir.

* * * * *

Q. And what were you about to do then? A. I was standing there to see what developed, what happened.

Q. Did you say anything to anybody? A. No, sir.

Q. Did you pull out your blackjack? A. No, sir.

Q. Or your billy? A. No, sir.

133 Q. Did you notice whether or not Galloway's mouth was bleeding at that time? A. I didn't notice it, no, sir.

Q. Did you at a later time see the condition of his mouth? A. No, sir.

Q. Could you see whether or not his face was swollen? A. I didn't see.

Q. And at the time that you were standing there Hilton had a firm hold on Galloway around the shoulders and neck, did he not? A. Around

the upper part of the body.

Q. And his arms were pinioned, were they not? A. He was more or less being restrained.

Q. And the only part of Galloway that was free was the feet; isn't that correct, sir? A. That is correct.

* * * * *

136 HUNTINGTON F. SMITH, JR.

* * * * *

137 DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and assignment? A. Private Huntington F. Smith, Number 11 Precinct.

* * * * *

Q. Do you know today one by the name of Robert M. Galloway?
A. Yes, sir, I do.

Q. And did you see him on March 11th, 1955? A. Yes, sir.

Q. At what time? A. About 3:50 p. m. * * *

Q. Did you see Galloway with anyone at the time when you first saw him? A. Not other than Officer Hilton.

Q. And where were they when you first saw them? A. They were
138 coming in the rear door of the station house in the 11th Precinct.

Q. Now, as they were coming into the precinct did you hear anything? A. I heard loud voices coming from the defendant, and he was cursing and swearing.

Q. Did you hear anything else? Did you hear any words used by him? A. Yes, sir.

Q. What? A. He stated that these white such-and-such people "killed my father but they are not going to kill me".

Q. And when did you hear those words? A. As soon as he brought him in the rear entrance of the stationhouse.

Q. Where, if anywhere, did the defendant Galloway and Officer Hilton go after you saw him? A. They went up to the--they turned right there in the station and went up the stairway to the detective's room.

Q. And when they were upstairs did you hear anything? A. They had been upstairs approximately, I would say a minute or so, -- maybe a little bit longer--and I heard loud scuffling of the feet and loud voices from upstairs totaling about four minutes.

139 Q. What did you do, if anything, when you heard that? A. My first idea--

THE COURT: Not what your idea was. What did you actually do, Officer?

THE WITNESS: I ran to the--came around from behind the patrol signal system and ran up the first flight of stairs at the rear door there, expecting the prisoner--

THE COURT: Not expecting. What did you do, sir?

BY MR. CAPUTY:

Q. How many stairs are there, the first flight of stairs that you ran up? A. How many steps?

Q. Steps; yes. A. Let's see. Ten or a dozen.

Q. On the first flight? A. Yes, sir.

Q. Then what did you do? A. Waited there for--I heard the scuffling of feet coming down the stairs and waited there and saw the defendant and Officer Hilton coming down the stairs with Officer Hilton having a sort of what you call bear hug around the defendant, and there they proceeded to pass me down the flight of stairs to the ground level of the stationhouse.

140 Q. How were they coming down the stairs? A. Sort of in--they were both on their feet and Officer Hilton had his arms around--had him from--had the defendant from the back and had his arms around the defendant's chest, from his back, locking him around, sort-of, in a bear hug position.

Q. How did Officer Hilton step down the steps? A. I would say approximately sometimes two steps at a time.

Q. Well, was he coming forward or backward? A. Backward at the time I saw him.

Q. Then after you stated that you saw them come to the first floor,

where did you go, if anywhere, then? A. After they went to the first landing I proceeded on down the flight of steps to the first landing by myself.

Q. Now, on the first landing, what, if anything, did you see? A. The only thing I saw when I reached--are you speaking of when I am on the stairs now?

Q. After they passed you, on the first floor. A. They went around the corner there in the station house which is between the railing and the wall, a passageway of about three and a half feet I would say. They went around the corner and that is all I saw momentarily.

141 Q. And did you come down to the first floor? A. Yes, sir.

Q. Did you see Officer Paul? A. Yes, sir. He was--he came from around behind the switchboard at the patrol signal system.

Q. Now, when he came from around the switchboard did he come out of the railing? A. Yes, sir.

Q. And where did he go? A. He went in between this narrow passageway where Officer Hilton had taken the defendant.

Q. Now, did you at that time have Officer Hilton and the defendant Galloway in view? A. No, sir, I didn't.

Q. Well, did you at any time have the defendant Galloway with Officer Hilton and Officer Paul in view? A. No, sir.

Q. Did you see anything happen to Officer Paul? A. No, sir. * * *

Q. Did you see Officer Paul later? A. Yes, sir.

142 Q. And where was he when you saw him? A. He was laying on the floor of the station house flat on his back and sort of in a semi-conscious state where he didn't quite know what he was doing. He was moaning.

* * * * *

BY MR. CAPUTY:

Q. As you were standing on the landing and you saw Officer Hilton and the defendant Galloway come down the stairs was any other police officer coming down the stairs at the same time? A. Detective Barbour was, I would say, about twelve stairs behind Officer Hilton.

Q. Now, do you know where, if anywhere, the defendant Galloway

was put later on? A. Yes, sir.

Q. Where? A. He was put in Number cell block.

Q. And by whom? A. By myself and Officer Hilton and Detective Barbour.

* * * * *

143 Q. While the defendant was being placed in the cell block by you and the other two officers, did anyone strike the defendant? A. No, sir.

* * * * *

THE COURT: * * * I understood you to say that you did see Officer Barbour pass you on the steps?

THE WITNESS: That is right; he came--

* * * * *

BY MR. CAPUTY:

144 Q. Downstairs, as you were putting the defendant into the cell block? A. I did, yes, sir.

THE COURT: All right.

* * * * *

BY MR. CAPUTY:

Q. And did you notice anything about his face, sir? A. He had a bruise on his right side of his face; I would say around about the cheekbone; and his shirt was torn, I would say about eight inches. * * *

145 CROSS EXAMINATION

BY MR. HARRIS:

* * * * *

Q. Now, when you were standing on the first landing of the stairs, Hilton came down and at that time he was dragging Galloway, was he not? A. That is right.

146 Q. And then Barbour, you said, was twelve steps behind him? A. About 12 I would say.

Q. Was he walking or running? A. He was running; in a sort of--

Q. Now, did Hilton continue to drag Galloway until he got out of your view? A. That is right.

Q. And he went around the corner? A. That is right.

Q. At that time you couldn't see him any more? A. No, sir.

Q. And when they got to the corner to turn, where was Barbour?

A. I don't remember.

Q. Well, where was Barbour when you last saw him? A. About two steps--I would say about two steps to the bottom of the first floor of the station house. He had already went by me.

* * * * *

147

BY MR. HARRIS:

Q. How long did you stand up on the landing? A. Just long enough for the defendant and Officer Hilton to go by me and Detective Barbour.

Q. And Hilton at that time, when he went by you, had a firm hold on Galloway, did he not? A. Yes, sir.

* * * * *

BY MR. HARRIS:

Q. Did you see Hilton relax the bear hug that he had on Galloway? A. No, sir. Not until after I had came down to the first landing there and turned around and turned around the corner, I seen Officer Hilton take the defendant into the sergeant's room there, and there he released his hold, where Officer Paul had been taken himself laying there on the floor.

* * * * *

151

BY MR. HARRIS:

Q. When you got around the corner you went immediately into the sergeant's office? A. No, sir. I stated that Officer Hilton, or Officer Paul, was laying there on the floor in this narrow passageway. He was laying there and the defendant and Officer Hilton were standing there, and a friend of the defendant's stepped into the picture and said "Stop it, stop it; you don't know what you are doing. You will only get yourself in more trouble."

Q. Now, all that happened before you got into the sergeant's office?

152 A. That is right.

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153

HARRY Q. BARBOUR

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment. A. Private Harry Q.

Barbour. I am assigned to Number 11 Precinct as a plainclothesman.

* * * * *

154 Q. Do you today know one by the name of Robert P. Galloway?

A. Yes, sir, I do.

Q. Did you see him on March 11, 1955? A. Yes, sir, I did.

Q. Was anyone with him at the time that you saw him? A. When
I first saw Robert Galloway, Private Hilton was with him. They entered
155 the detectives' office on the second floor and I was seated behind the desk,
on one side of the desk, and Sergeant Gerber was on the other side, doing
some typing. At the time he entered, --at the time Officer Hilton and
Galloway entered the office-- * * *

THE COURT: I understood you to say you were at one side of the
desk and the detective-sergeant was at the other side of the desk.

THE WITNESS: When they first entered the room; yes, sir.

THE COURT: Then what did you say, if anything, sir?

THE WITNESS: Galloway, the defendant, was told to take a seat
on the opposite side of the room, which he did. And Private--I stood up
and Private Hilton proceeded to tell me the reason why he had brought
Galloway in. It was in connection with a petty larceny of a coat earlier
in the evening.

So while Hilton and I were standing there talking in regard to the
case, Galloway became loud and boisterous, started cursing. So I turned
and said to him, I said, "What's the matter with you, boy? Get yourself
156 quieted down. Quiet down a little bit."

And he proceeded to talk very loud and use loud, profane language,
and I said to Hilton, "Take him downstairs", and Galloway jumped up out
of the chair and he struck me in the mouth, knocked me backwards
towards the wall, the far side of the room, and then he came at me and
grabbed me and tore my shirt down the front, and Private Hilton finally

got a-hold of him from the back and he and Hilton went out the door backwards. Hilton was pulling him backwards.

So I regained myself there and I went out and he was kicking and thrashing about pretty badly, and I regained myself and went out, went towards him to help Private Hilton. And when I got within range of Galloway, he kicked me in the groin.

When I went down, doubled up and went down, why, I got kicked in the eye, the right eye. That was black for a few days; scratched up and all. So then Private Hilton still had hold of Galloway and they started down the hall to the stairway and on down the stairway. They were on the--let's see; there are two landings there. They were on the second
157 landing going down. I had gotten up again and started downstairs myself, and they were on the second landing going down when I got to about the top of the stairs.

And of course they were still moving, all this time they were still moving downstairs to the first floor. So I started down the stairs myself and when I got downstairs Private Paul--there is an entrance there where you go behind the rail--Private Paul was coming around the entrance, and I reached the bottom then and Galloway kicked Paul. Paul went down on the floor. So I went to help Hilton again and I got the second kick.

So finally Private Smith came from behind the rail and between Smith and Hilton and myself, we got a-hold of Galloway and finally got him in the cell block, placed him in Cell Block Number 4, at which time he became quiet. He quieted down and there was no more trouble. And then I got sick to my stomach and I asked Hilton, I said, "Come on, go in the men's room with me."

So we started out of the cell block and on the way out near the door of the cell block my revolver was lying on the floor. Somehow during the tussle it had come out of the holster and dropped to the floor. I didn't even know it. And Hilton saw it and brought it to my attention and I picked
158 it up and stuck it in my holster and Hilton and I walked into the men's room, at which time I examined myself and I was swollen pretty bad and became sick to my stomach.

A few minutes after that, just how long, I don't know--I couldn't tell you--I talked with Sergeant Gerber--there was an ambulance called, incidentally, for Private Paul and he was sent to the hospital in an ambulance.

Q. Did you at any time in the detectives' room strike the defendant Galloway? A. Did I strike him?

Q. Yes, sir. A. No, sir. I couldn't get close enough to him to strike him. He was nothing but feet.

Q. Did Sergeant Gerber strike him, sir? A. No, sir.

Q. Did Private Hilton strike him? A. Private Hilton didn't strike him. He grabbed hold of him to restrain him.

Q. Now, did you at any time, when you were in the defendant's presence downstairs right near the rail, and also in the cell block, strike this defendant? A. No, sir. At no time.

Q. Did any officer in your presence strike him? A. No, sir.

159 Q. Now, do you know whether the defendant had any marks or bruises about his face? A. No; to my knowledge, no, sir.

Q. Did you receive any medical treatment, sir? A. Did I?

Q. Yes, sir. A. Yes, sir. I did; at Emergency Hospital.

Q. When did you go? A. I went not long after this incident. After this thing happened I went to the hospital myself. I drove myself up there in my own car.

Q. And how long did you stay at the Emergency Hospital? A. Let's see. This was on a Friday night. I stayed there until about 1 or 1:30 Saturday afternoon.

Q. That is March the 12th? A. March 12th; that is right.

Q. Now, what, if anything, did they do for you at the hospital? A. Well, I was packed with ice.

Q. Whereabouts, sir? A. In the groin, sir. And when I was released I was told to go home and do the same thing at home, give myself the same treatment at home, which I did for approximately two days.

160 Q. Did you receive any other medical treatment after you left the hospital? A. Yes, sir. I had to go back to the police clinic, to Doctor

Dean, I believe.

Q. How many times did you go there? A. As near as I can remember, sir, it was three times. I was off about six days.

* * * * *

CROSS EXAMINATION

BY MR. HARRIS:

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161 Q. Now, Officer Barbour, did you have on a uniform? You were not uniformed that night? A. No. I had on civilian clothes like I have on now.

Q. You didn't have a coat on, did you? A. Yes, sir, I did, a sport jacket; a green sport jacket.

Q. And did you have your revolver in a holster? A. Yes, sir. It is in that same holster right now.

Q. Sir? A. It is in that same holster right now.

Q. And where did you carry it? A. On this side. The right hip. Or right side.

Q. And you have no idea, of course, how your revolver got out of its holster? A. No, sir, I don't.

Q. You didn't hear it hit the floor? A. No, sir. With all the commotion I don't recall it.

Q. You didn't know anything about the revolver being missing until Hilton told you it was on-- Hilton noticed it on the way out of the cell
162 block. As I said, we were headed for the men's room and Hilton noticed the revolver lying there and mine is a short, snub-nosed revolver which is not carried by uniformed men; and there were no other plainclothesmen there but myself, and Hilton took it for granted it was mine.

Q. What did Hilton say about the revolver? A. He pointed to it-- he says, 'Barbour, there is your revolver.' I reached down and picked it up. And as I say, at that time I was sick to my stomach and we continued on into the men's room which is just across the hall from the cell block.

Q. And Hilton knew that was your gun that he saw on the floor?

A. As I say, Mr. Counsel, my revolver is a short, snub-nosed revolver which is not carried by uniformed personnel. Theirs has a four-inch barrel, and as there were no other plainclothesmen in the cell block, Hilton took it for granted it was my gun.

Q. He just figured it was yours? A. Figured it was mine, sir.

Q. And you didn't have that gun out to shoot Galloway with, of course, did you? A. No, sir; no, sir.

163 Q. You didn't tell him you were going to kill the little bastard, did you? You didn't say that? A. No, sir. To my recollection, no, sir. As I said, when they placed the defendant in the cell, he became quiet. That was it.

* * * * *

BY MR. HARRIS:

166 Q. When they came in, did Hilton have his hand in the belt of Galloway? A. If I am not mistaken, Mr. Harris, when they walked in the door, the defendant Galloway was in front of Hilton. Hilton was a little off to his left, to the rear of him, and whether or not he had ahold of his belt I can't say; I couldn't see that.

Q. Then Galloway was seated beside the wall? A. He walked over himself and took the seat, sat down in front of the window, across on the opposite side of the room from the doorway.

Q. You told him to have a seat, didn't you? A. Yes; we told him to go sit down.

Q. And he did? A. Yes, sir.

Q. Now, where was Sergeant Gerber at that time? A. Sergeant Gerber was seated alongside the desk nearest Galloway. He was typing some reports.

Q. About how far away from Galloway was he seated? A. I don't know. In feet I guess maybe five or six feet. * * *

167 Q. After Galloway was seated did you leave the room? A. Did I leave the room after he was seated? * * * A. No, sir. I was seated on the opposite side of the desk from Sergeant Gerber, and after Galloway had his seat, I got up and Hilton and I started talking about the case. He

started explaining the reason why Galloway was in there.

Q. You didn't go outside the room at all, to talk to Hilton? A. No. We stood right there in the doorway. * * *

Q. And did Hilton go outside of the room? A. As near as I can remember, no, sir. Not until he grabbed a-hold of Galloway and took him downstairs.

Q. Now, didn't Hilton take you aside or you took him aside for the purpose of discussing why Galloway had been brought in? A. Well, I wouldn't call it taking anyone aside. Hilton started to explain the case. As I say, I stood up and faced Hilton. Hilton had his back to the door. I was facing Hilton with my back to the defendant.

* * * * *

168 Q. But he was about twelve feet or eleven feet away from you, was
169 he not? A. I would say about ten feet maybe; nine or ten feet.

Q. Now, while you were talking to Hilton did you return to Galloway to do anything or say anything? A. Yes, sir, I did. As I said, while Hilton and I were standing there talking, the defendant became loud and boisterous and used some pretty nasty language. So I turned and said to him, "Quiet yourself down, boy; what's the matter with you?" And he wouldn't quiet down and he kept right on.

Q. And did you; after doing that, did you go back toward the door or wherever Hilton was standing, the other side of the door? A. No, sir; because that is when things started to happen; right then and there. And I told him to quiet down and I turned to Hilton and I said, "Take him downstairs."

Q. You told Hilton to take him downstairs? A. That's right. I said "Take him downstairs." I don't know whether I was talking to Hilton. I just said, "Take him downstairs." That is when the defendant jumped up and struck me in the mouth and knocked me against the wall.

170 Q. Why did you tell Hilton to take him downstairs? A. Because the boy was very disorderly. We just couldn't--he wouldn't quiet down, so why keep him up there?

Q. So now when Hilton came up to tell you why he brought Galloway

up, he told you, didn't he? A. Yes; that is right. He explained the reason for Galloway being in the station; yes, sir.

Q. And he said something to the effect that he was investigating some alleged stolen coat, didn't he? A. That is right.

Q. And he desired you to further investigate the matter, didn't he? A. That is right.

Q. And it was your understanding that you were to question Galloway about the coat? A. Well, we hadn't quite gotten that far, sir.

Q. You didn't get a chance to hear why Hilton had him? A. No; I--beg pardon?

Q. I said you hadn't gotten that far. Had Hilton told you to question Galloway? A. Mr. Harris, I can tell you just about what Hilton told me if you will let me.

Q. I am asking you. Would you please answer my question and then you may explain about it later? A. Sure; okay, sir; go right ahead.

Q. Did Hilton tell you that he, Hilton, desired you to question
171 Galloway about this coat? A. Yes, yes.

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172 Q. Did you strike Galloway in the mouth at that time? * * *

A. Mr. Harris, I struck Galloway at no time.

* * * * *

174 BY MR. HARRIS:

Q. This coat that you and Hilton were supposed to be investigating; did you ever see the coat? A. No, sir, I never did.

Q. And did you later find out that that coat was never stolen? A. I was told about it later; yes, sir.

* * * * *

Q. Now, after you say that Galloway jumped out of his seat and struck you, did Officer Gerber come over? A. Well, when he struck-- when he come out of the seat and struck me, I went back against the wall
175 and the defendant came at me again and he grabbed me here, in the lapel of the coat, and the shirt like this, and that's when Hilton got hold of him and pulled him away and he tore my shirt all down the front. And then

Hilton had a hold of him and they backed out to the door and, as I said, when I recovered myself I went to give Hilton a hand because the defendant was kicking and thrashing quite a bit, and that is when I got kicked.

* * * * *

Q And as far as you know, nothing of any violent nature happened to this defendant in the second-story room of Number 11 Precinct on this occasion? A. I know nothing violent happened to the defendant in the detectives' room on the second floor of Number 11 Precinct.

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177

ARTHUR B. GERNHOFER

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment. A. Sergeant Arthur B. Gernhofer, uniform sergeant in Number 11 Precinct. * * *

178 Q. * * * Directing your attention to March 11th, 1955, did you receive a telephone call and return to the precinct? A. I did.

Q. And what time was it you returned to the precinct? A. About five minutes past ten on Friday, March 11th.

Q. When you returned to the precinct did you see Officer Paul? A. I did, sir.

Q. And where was he? A. He was seated in a chair in the sergeant's room

Q. Can you describe his condition at the time that you saw him? A. He was in a state of shock. His face was very pale and he was sprawled in a chair with his legs outspread, and he had a dirty footprint on his groin, that showed quite a bit against the blue uniform trousers.

* * * * *

179

BY MR. CAPUTY:

Q. And in the cell block did you see one by the name of Robert P. Galloway? A. I did, sir. * * *

Q. Did you talk to him at the time? A. I did. He was lying down in the cell block and I asked him how he was feeling, and I asked him to get up and walk toward me, for the purpose of finding out if he had any

injuries. And to talk to him. But he was very--he didn't want to talk, except to answer that he was feeling all right.

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180

CROSS EXAMINATION

BY MR. HARRIS:

Q. Now, Sergeant, why did you ask Galloway how was he feeling?

181 A. For the purpose that--if a prisoner--it is our duty as supervisor, and if a prisoner is injured in any way, in any fracas, or just injured, brought in there, --we are supposed to see that he gets immediate medical attention.

Q. And you supposed, of course, that there was a possibility that Galloway might need medical attention? A. That's right.

Q. Did you hear him groaning while he was lying on the cell floor?
A. He wasn't on the cell floor. He was lying on the bunk with his--out-stretched on the bunk with his feet toward the door.

Q. And you didn't hear any cries of pain or any groaning there?
A. No, sir.

Q. And you didn't see a split lip; this defendant's lip split? A. No, sir.

Q. And the light was very bright and you could see very well? A. That's right.

Q. And you looked at his face? A. I did, sir.

Q. And there were no discolorations, no bruises? A. None that I could see.

182 Q. Or no scratches? A. None that I could see, sir.

Q. And his face was not swollen? A. No, sir.

Q. Did you order this defendant taken to the hospital? A. I believe Lieutenant Myers ordered him shortly after I came in there. Lieutenant Myers came in the station several minutes after I did, and he talked to the defendant. That's what he told me, he talked to the defendant. I believe the lieutenant ordered him to a hospital.

Q. The lieutenant ordered him to go to a hospital? A. No; he ordered us to transport him to the hospital for a complete examination.

Q. And do you know how he got to the hospital? A. Not of my own

positive knowledge. I believe it was the patrol wagon took him there.

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184

ERNEST P. MYERS

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BY MR. CAPUTY:

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Q. Now, in March, 1955, particularly March 11, 1955, were you assigned to the Metropolitan Police Department? A. That is right.

Q. In what capacity, sir? A. As a lieutenant, Number 11 Precinct.

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187

CROSS EXAMINATION

BY MR. HARRIS:

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188

Q. Now, didn't this prisoner, or this defendant Galloway, complain to you of being struck in the face by Private Barbour? A. He said he was hit in the face. He didn't say by any individual at all. And then I got right ready and had him go to the hospital.

Q. Did he tell you how many individuals hit him? A. What's that?

Q. Did he tell you how many individuals hit him? A. No, he didn't.

Q. Did he tell you how many times he was hit? A. No.

* * * * *

189

MR. HARRIS: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Bench Conference)

* * * * *

MR. HARRIS: Upon the grounds that the evidence clearly shows that this defendant was illegally arrested from the inception, I would ask that on that ground he had a right to use sufficient and reasonable force to resist the unlawful arrest and the unlawful custody, and therefore I move that there be a directed verdict or a judgment of acquittal at this time.

190

THE COURT: I will deny your motion, sir. * * *

(Open Court:)

EVIDENCE ON BEHALF OF THE DEFENDANT * * *

EULALIA GALLOWAY TOLAND

* * * * *

DIRECT EXAMINATION

BY MR. HARRIS:

* * * * *

Q. Are you the mother of Robert P. Galloway, Jr.? A. Yes.

191 Q. Now, directing your attention to the 11th day of March of this year, as a result of information received did you go to the Number 11 Precinct? A. Yes.

Q. Now, why did you go to the Number 11 Precinct? A. Because my youngest son came home and told me that--

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THE WITNESS: Ronald told me that Officer Hilton was taking -- had taken Robert to the precinct. * * *

192 BY MR. HARRIS:

Q. And did you go to the precinct? A. I went immediately to the precinct.

Q. Now, do you recall about what time it was when you arrived, Mrs. Toland? A. About 9:30.

Q. Now, at that time did you have any conversation with anyone in the precinct? A. I went to the desk, the station clerk, I imagine, and asked the gentleman there what was Robert Galloway there for--what was he charged with. He told me that he didn't think he was there. So I asked didn't a young boy with glasses on come in with Officer Hilton. So he said, "Yes, I believe so". So he looked at the book. He said "He is not charged with anything".

So I asked him how could I find out, then--I knew he was there-- how could I find out what had happened, what went on. So I asked him if
193 the captain was there. He said no, but the lieutenant is here. So I asked him where he was. He said "He will be down in a few minutes." And at that time--shall I proceed?

Q. Now, what happened next? A. And while standing there talking

with the clerk, we heard -- I heard screams from the back of the precinct. I heard my boy Robert scream "Mama, they are trying to kill me" or "They are going to kill me".

I immediately ran back to the end--the far end where the screams came from, to the entrance to the cell part. There I saw--the door was open, the iron door was open--I saw an officer in uniform, Officer Barbour in plainclothes, and Officer Hilton in back of the two officers, pushing him towards the door. Officer Barbour had--

Q. Who was pushing who toward the door? A. Officer Hilton was pushing these other two officers out. Officer Hilton was the farthest back in the cell block. The other two officers were being pushed towards the outside, out of the door, and they were pushed out of the door hard against the wall.

At the time that I ran back, also Randolph Chase ran back, and some officers from behind the railing came out and people were saying
194 "You can't go back there". But we were there. Then someone closed the cell door. Randolph said, "Look at the man with the gun", and the officer was apparently trying to put the gun down in his--I don't know, holster, or pants. But he was sticking down like this (indicating.) And--let me see: After that--

Q. Did you hear any conversation between that officer and your son? A. No. Robert's screaming-- * * *

BY MR. HARRIS:

Q. After that happened, what, if anything, did you do? A. Well, there was some conversation. Officer Barbour and another officer talked to Randolph Chase, told him that he did not see a gun. Randolph said, "I did see a gun and I am telling the truth. You know he had it. You know I saw it." So I told Randolph not to--wasn't any use talking about it. I saw it, too. So nothing more was said to him concerning the gun. Then Officer Barbour came behind the rail and said something about charging him with assault on an officer.

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* * * * *

Q. Did you ask Officer Hilton why he arrested your son? A. Yes.

Yes, I asked him.

Q. Well, tell us exactly what was said by you and what was said by Officer Hilton in that regard. A. Officer Hilton said that he took him down for questioning about a stolen coat.

Q. Now, did Officer Hilton tell you anything about any disorderly conduct on the way to the precinct? A. No.

Q. Well, what did he say about the trip from Talbert Street and Nichols Avenue to the precinct, one block away, if anything? A. Nothing, only he said Robert went with him--went willingly with him to the precinct.

Q. And did he tell you--did he say to you that Robert had used any profane language or had cursed him on the way to the hospital? A. No.

196

* * * * *

Q. Now, a little bit later on did you see your son at the precinct? A. Yes.

Q. What was his condition at that time? A. Well, swollen, bruised face and cut lip--I mean swollen and blood was showing on his lip here.

Q. Did you talk to your son at that time? A. For a few moments, when he was brought in the--brought in the precinct so I could see him.

197 The lieutenant told me that they were taking him to the hospital because Robert was hurt and they were taking him to the hospital for an examination. I went over to speak with him and they said they were ready to leave for the hospital.

Q. Now, when was the last time you had seen your son prior to your seeing him in Number 11 Precinct? A. Oh, not more than ten minutes before, because he had just taken me home from work and left me.

Q. Now, what was his condition as to his face and lip at the time that he left you? A. There was nothing wrong with him.

Q. Now, did you have your son treated for his injuries? A. Yes, I did.

Q. When and where did you have him treated? A. The next morning, Saturday morning, at Doctor Kenneth G. Brown.

Q. Do you know how many times he was treated by Doctor Brown,

if you know? A. Several times. * * *

CROSS EXAMINATION

BY MR. CAPUTY:

Q. What was he treated for by Doctor Brown? You say he was
198 treated several times. What was it for? A. Well, Robert had recently
had an operation, a hip operation, which he said hurt him at that time
during that fall down those steps, and immediately after, the next day,
he had trouble with his jaw, wouldn't close right; hurt him to eat; and
that's what he was going to the doctor for treatments for.

* * * * *

209 BY MR. CAPUTY:

Q. Let me ask you if you know what the word "book" means. A.
Well, I assume it is when you get a person's name, address, and so forth.

Q. When was your son booked? A After he returned from the
hospital.

Q. What time was that? A. After twelve o'clock at night.

Q. Well, approximately what time? A. I don't know. I would say
between twelve and 12:30; something like that.

* * * * *

211 REDIRECT EXAMINATION

BY MR. HARRIS:

Q. Now, Mrs. Toland, when you returned from the hospital your
212 son was--when your son was returned to the precinct from the hospital,
did you see your son taken to the rail, or the place where the desk ser-
geant sat? A. Yes.

Q. Now, will you tell us, Mrs. Toland, if there was any conversa-
tion between your son and a police officer at that time? A. Yes. He was
asked full name, address, age, and the name of his mother and father,
his sisters and brothers. Which I thought that was booking, being booked.

Q. Then at that time where were you standing? A. I was in the
precinct. You know, just standing outside the rail. He was sitting be-
hind the rail in the precinct.

Q. Now, I will ask you: Do you remember about what time it was

that your son was finally released on bail? A. It was after three in the morning.

* * * * *

221

MINNIE IRMA HARLEY

* * * * *

DIRECT EXAMINATION

BY MR. HARRIS:

* * * * *

Q. Now, I will direct your attention to March 11th of this year and ask you: Were you in a restaurant on Nichols Avenue called Thelma's Coffee Shop or Thelma's Restaurant? A. Yes.

Q. Who is the owner of that restaurant? A. Mrs. Thelma Beasley.

Q. Thelma Beasley? A. Yes.

Q. Is Mrs. Beasley related to you, Ma'am? A. Yes; my sister.

Q. Now, in the afternoon or early part of the night did you have occasion to see Private Hilton of Number 11 Precinct? A. Yes.

222

Q. About what time did you see him, Madam? A. It was after eleven o'clock or close to it.

Q. Well, did you see him earlier than eleven o'clock? A. I don't know exactly what time it was but it was before I went off duty.

Q. Now, where did you see him, Madam? A. At the lunch room, the coffee shop.

Q. Did he come in to the lunch room? A. Yes.

Q. And do you know why he came into the lunch room? A. I had been inquiring in the neighborhood about a coat and he came into there to ask about it.

Q. He came in to ask you? A. Yes.

Q. What did you tell him? A. I told him that when I got ready to leave, I went back to the dressing room to get a coat, and it was not there and that I had been asking around the neighborhood about it, and he asked me who had been in there when I had went back there to it, so I was telling him about a young boy that had went in the back and stayed back there a while and then came out, and he asked me who else was with him, so I

told him that I didn't know all of them's names, but I knew one of them's
 223 names. But I said that I would know the rest of them when I would see
 them.

Q. Did you later find out the name of the boy who went into the
 back? A. No.

Q. That boy was not Robert P. Galloway, Jr.? A. No; he did not
 go in the back. * * *

Q. What did Officer Hilton say to you? * * *

THE WITNESS: Officer Hilton asked me if I had spoke to any of the
 boys that were at the table that I mentioned to him and I told him yes, and
 he asked me where I had seen them and I told him at the pool room I saw
 one of them, and at a beer garden that I had saw Rob--the Galloway boy.

224 And he asked me to go with him and point out the boy because the
 other boy that was at the pool room I did not know. So we went across the
 street to the pool room and I pointed out the boy that was at the pool room
 that had been at the lunch room earlier.

BY MR. HARRIS:

Q. Now, did you say to Officer Hilton that Robert P. Galloway, Jr.,
 had stolen a coat? A. No.

Q. Did you say to Officer Hilton that the coat belonged to you? A.
 No. I said--

Q. Who did you tell him the coat belonged to? A. To my sister.

Q. Did he ask you when had you last seen the coat? A. Yes. He
 asked me--no, he asked me when had I missed the coat.

Q. He asked you when had you missed that and what did you say to
 that? A. I told him when I got ready to leave that I went back to the dress-
 ing room and the coat was not there.

Q. Now I will ask you again: Did Officer Hilton ask you or did you
 tell Officer Hilton when you had last seen the coat? A. No.

225 Q. You didn't tell him? A. Not when I had last seen it.

Q. You didn't tell him when you had last seen it? A. No.

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BY MR. HARRIS:

Q. What time did you go to work, Mrs. Harley? A. 3:30 p.m.

Q. And it was a matter of at least five hours or six hours before you talked to Officer Hilton. Isn't that correct? A. Yes.

226 Q. Now, how many people had come into your restaurant between 3 o'clock and 9 o'clock that night? A. Not too many, because it was a slow night; because that is why I was on by myself; it was during the week.

Q. Would you say as many as a dozen? A. Yes.

Q. Could it be possible that there were more than a dozen that came in during that time? A. Maybe; but not much more than a dozen.

* * * * *

BY MR. HARRIS:

Q. Did Officer Hilton ask you how much the coat was worth? A. Yes.

Q. What did you say to him? A. I told him it was seventy-nine or eighty-nine dollars.

227 Q. And you told him that? A. Yes.

Q. Now, there came a time when you discovered the coat, or where the coat was, didn't there? A. Yes.

Q. Now, tell the ladies and gentlemen of the jury, where was the coat during all these times that you were talking to Hilton and all that particular day? A. My sister had it.

Q. And as a matter of fact the coat belonged to your sister, didn't it? A. Yes.

Q. And your sister had come in to the restaurant, had she, to get her own coat? A. Yes. * * *

CROSS EXAMINATION

BY MR. CAPUTY:

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Q. It was about ten after nine on March 11th that you saw Officer Hilton in the restaurant and you told him about the coat, wasn't it? A. 228 It was before I went off duty.

Q. It was ten after nine, wasn't it? A. I don't know exactly what time it was. It was before I went off duty.

Q. At that time didn't you tell Officer Hilton that the coat was in the restaurant and that it was there up until the time that the defendant Galloway and two other boys came in the restaurant and then you found it missing? A. I did not.

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233

RONALD JOHN GALLOWAY

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DIRECT EXAMINATION

BY MR. HARRIS:

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Q. You are the brother of Robert P. Galloway, Jr., are you not?

A. Yes, sir.

234

Q. Now, directing your attention to March 11th of this year, did you see your brother in the company of Officer Hilton? A. Yes, sir.

Q. About what time was that and where did you see him? A. It was between--I guess it was between a quarter of ten and ten o'clock. They was going to the police station.

Q. Now, did you have any conversation with your brother at that time? A. Yes, sir.

Q. What was said by your brother and what was said by you? A. I asked him--he said "Go home and get mama". I said, "What's wrong". He said "He is taking me down there for nothing." He didn't know what he was taking him down there for.

Q. And what did you say to your brother? A. I said "All right."

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235

BY MR. HARRIS:

Q. What, if anything, did you do after that, Ronald? A. I went straight home and got my mother.

Q. And what did your mother do? A. Well, I went up and told her and she came straight down to Number Eleven Precinct.

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239

RANDOLPH CHASE

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DIRECT EXAMINATION

BY MR. HARRIS:

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Q. Now, on the night of March 11th of this year did you see Ronald Galloway at about 9:15? A. Yes, I did.

Q. Did you see Robert Galloway, Jr., at about that time? A. That's right.

Q. And where was he when you first saw him? A. He came to the store to pick his mother up.

* * * * *

240 Q. Now, did there come a time when you saw Officer Glenn Hilton?
A. I didn't get that, sir.

Q. Did there come a time when you saw Officer Hilton? A. Yes, I did.

Q. Where were you at that time? A. Sitting in the car.

Q. And where was the defendant Robert P. Galloway, Jr.? A. Sitting in the car also.

241 Q. Now, what was said by Officer Hilton at that time, if anything?
A. He came to the car and asked Robert to come to the precinct with him. So Robert asked him what for. He said, "I just want you to go down to the precinct with me." So Robert asked him could he park his car, and Officer Hilton said "Yes." So he parked his car over next to his mother's liquor store, right in front of his mother's liquor store.

Q. And did you see Officer Hilton and Galloway walk toward the Number 11 Precinct? A. Yes, I did.

Q. And where were you at that time? A. I had gotten out of the car before Officer Hilton had gotten out of the car and Robert got out on the driver's side. Officer Hilton--no, Officer Hilton had gotten out before me as I was sitting in the middle, and Robert asked me where I was going and I told him I was going across the street.

I went across the street. All the time I was going across the street I was watching them both while they were walking down the street. So I went on across the street to talk to some friends across the street in

another car, and then I left and went down to the precinct.

242 Q. Now, when you got to the precinct do you know about what time that was? A. That was about fifteen minutes after Robert was taken to the precinct.

Q. Did you have any conversation with anyone in the precinct when you first arrived? A. Yes, I did. When I arrived at the precinct I asked an officer there has a fellow by the name of Robert Galloway been brought into the precinct, and at that time he told me no one had been brought into the precinct by that name. And so he asked other officers and the other officers couldn't recall.

So he asked me to stand over to the side. He says, "Wait". So while I was waiting over to the side away from the railing as you go into the precinct, then I heard all this screaming and hollering upstairs, and sounded like wall lockers were knocking against--somebody was being knocked against the wall lockers and things.

So I ran to the stairway that leads upstairs and I continued to hearing this screaming and hollering and it sounded just like Robert's voice.

243 So the next thing I thought about was running to the phone to get his mother on the phone, because as far as I am concerned she didn't know anything about it. So when I got on the phone I called his mother and his step-father told me that his mother was on the way down to the precinct; and I hung up the phone.

A few minutes later she arrived at the precinct. Before she arrived at the precinct they were dragging Robert down the stairway. Officer Hilton had him, had a-hold, looked like a half-nelson hold between the arms and behind the neck. He was coming down the steps dragging him down the steps.

Q. Now, when he was dragging him down the steps, was Robert kicking his feet up and down? A. The whole time that he was coming down the steps screaming and hollering, he was kicking his feet.

Q. And there came a time when they got to the ground floor level, did there not? A. That is true.

Q. Now, what happened down there? A. That's when an officer--

all the officers rushed from behind the pulpit, I call it, and Officer Paul was the one that rushed in and got kicked.

244 Q. Was Robert kicking up and down before Officer Paul got to him?

A. Yes, he was.

Q. And did Officer Paul make an effort to catch his feet? A. Yes, sir.

Q. Now, after that occurred did there come a time when Robert Galloway was taken to the cell block? A. Yes, sir, there were.

Q. Who took him to the cell block? A. Officer Hilton.

Q. And did anyone else assist? A. Officer Barbour went back there along with him.

Q. And when they got back to the cell block what, if anything, happened? A. Some more commotion happened in the cell block, because Robert was screaming that they were trying to kill him.

Q. Now, what, if anything, did Officer Barbour do? A. At the time I rushed back there, and me and his mother rushed back to the cell block, the entrance to the cell block, that is when we saw Officer Hilton pushing Officer Barbour and another officer out which I could not identify, and Officer Barbour had a pistol in his hand.

245 Q. Did you hear Officer Barbour say anything? A. Yes; I heard Officer Barbour kept repeating he will kill the little bastard.

Q. Did you hear Officer Hilton say anything to Officer Barbour or to any other person? A. I don't remember.

Q. Now, after that did you see Robert Galloway? Did you see his face? A. When he was brought downstairs, yes; when he first came downstairs scrambling I did.

Q. When you saw him at that time what was the condition of his face? A. It was bruised and kind of bleeding.

Q. Did you notice his mouth? A. Yes, sir. His mouth had been burst.

Q. Now, when you were in the car with Officer Hilton and Robert P. Galloway, what was the condition of his face at the time he left with Officer Hilton? A. Wasn't any scars and bruises on his face at that time.

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CROSS EXAMINATION

BY MR. CAPUTY:

Q. Now you say that Galloway's face was bruised and bleeding.

246 What part? What part of his face was bleeding? A. The frontal part.

Q. What does that mean? A. The right cheek was bruised and also he had blood streaks on his right, on the left side.

Q. Right where you pointed on the cheek bone? A. Up in here.
(Pointing.)

Q. Did you notice where that blood came from? A. From him.

Q. I mean what part. Did it come from his eye? A. From his face.

Q. But not from the eye; is that it? A. That is right.

* * * * *

250 Q. Now, how long did it take you to make this telephone call to Mrs. Toland? A. The moment I heard the racket and screaming and hollering and I went to the stairway, and came back to the phone. I will say approximately not even a minute or two.

251 Q. Now when you heard that screaming and hollering Mrs. Toland wasn't there, was she? A. No; she wasn't.

Q. And when Officer Hilton was bringing Galloway down, dragging him down the stairs, she wasn't there either, was she? A. No.

Q. Now, what did you hear the defendant Galloway say on the first floor after he was brought down by Officer Hilton? A. He said they was trying to beat him and they was beating him.

Q. Did he say anything else? A. Not that I can remember.

Q. Well, did he say, "You white so-and-so killed my father but you are not going to get me"? A. No; I can't remember that.

Q. Now, did you ever make that statement that Galloway said that? Did you make that statement to the FBI officers who questioned you on March the 16th? FBI agents Nagle and McGahey? A. I don't remember saying "No white bastards" or nothing like that were trying to kill him.

Q. Did you make that statement or something like it to the FBI

agents when they talked to you? * * * A. As far as killing his father;
252 yes, sir.

Q. Now, after Private Hilton came downstairs with the defendant Galloway, did the defendant Galloway calm down? A. After they got down to the first floor?

Q. Yes; on the first floor. A. He was still screaming and hollering.

Q. And didn't he calm down? A. Not as I remember, sir.

Q. Did you tell the FBI agents on the same time that you were talked to by them, that the defendant Galloway seemed to calm down? A. Not as I can remember.

Q. Now, downstairs did Officer Hilton always keep hold of the defendant Galloway? A. Yes, he did.

Q. Did he at any time release--did at any time Officer Hilton release his grip? A. You mean just turn him a-loose?

Q. Yes. A. No. He didn't never turn him a-loose; never did turn him a-loose.

Q. Did you tell these same FBI agents that on the first floor Private Hilton released his grip? A. I didn't say he turned him a-loose.
253

Q. I am talking about releasing his grip? A. Releasing his grip means turning him a-loose.

Q. Did you tell the FBI agents that on that first floor Private Hilton released his grip of the defendant after the defendant calmed down? A. No.

Q. And was the defendant squirming and twisting when he was on the first floor? A. Yes.

Q. And wasn't it then when he continued to squirm and twist that Private Hilton renewed his hold on the defendant again? A. He was continuing twisting and turning the whole time Officer Hilton had hold to him.

Q. Now, it is your testimony that a police officer came out and he was kicked; that he was kicked when he was trying to grab the defendant Galloway's legs; is that it? A. That's right.

Q. Now, where was this police officer at the time that he was kicked by the defendant? A. After the defendant arrived on the first floor, when Officer Hilton had him, dragging him downstairs, when they
254 landed on the first floor they all rushed out from behind the pulpit.

Q. Now, isn't it true that as this officer reached this opening in the rail that he was kicked then by the defendant Galloway? A. No.

Q. Now, did you tell the FBI agents when you were interviewed by them, that as an officer reached the opening in the rail, he was kicked in the groin by the defendant? A. No, I did not.

Q. You didn't tell him that? A. No, I didn't. I didn't say nothing about the opening of no railing.

Q. But you didn't tell the FBI agents that the officer tried to take hold of his legs, did you? Huh? A. He rushed in, grabbed him--made an attempt to grab his legs.

Q. You didn't tell the FBI agents that, did you? A. I didn't tell them that?

Q. No. A. I told them he rushed in and attempted to grab his legs and that's when he got kicked.

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257 BY MR. CAPUTY:

Q. Now, after Galloway was placed in the cell block, did there come a time that you ran to the cell block? A. After I heard him screaming, talking about they trying to kill him.

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260 Q. Who was holding that gun? A. Officer Barbour was holding the gun.

Q. Now, was it pointed upwards or how? A. When he come out the gun was in his hand and I told Mrs. Galloway, "He has a gun" and then at the time when the officer pushed him into the latrine and he tried to get it down between the trousers and his shirt.

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BY MR. CAPUTY:

261 Q. Now, this gun that you say that you saw in the hand of Detective

Barbour: Can you tell us what kind of gun it was? A. I am afraid I can't, sir.

Q. How about the size of it? What-- A. When I saw the gun I got upset, and I told Mrs. Galloway--I was just upset, mostly because when I heard him hollering about the gun and shoot him, that just upsets anyone. Then here come the officer running out there with a gun, being pushed out of the cell block with a gun; that's enough to upset anyone.

* * * * *

262 Q. Now, when was it when you heard Detective Barbour say, "I will kill that little bastard", as you testified? A. On the way--as Officer Hilton was pushing him out and also he was telling the other officer when he was putting the pistol down in his trousers, that he was going to kill the little bastard.

The whole time when Officer Hilton was pushing him out of the cell block into the little latrine, he was still making that statement that he was going to kill the little bastard.

Q. Well, did the detective, Barbour, say anything else in addition to "I will kill that little bastard." A. He also said "This little bastard is crazy". He will kill him.

Q. Now, isn't it true that that gun was on the floor at the cell block door? A. No.

Q. And that it was picked up by Officer Hilton and given to Detective Barbour? A. No; it is not true.

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271

THELMA BEASLEY

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DIRECT EXAMINATION

BY MR. HARRIS:

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Q. Are you the owner of a place of business? A. Yes.

Q. And that place of business is known as Thelma's Restaurant?

A. That is right.

Q. And it is located in the 2400 block of Nichols Avenue Southeast,

I believe? A. Yes.

Q. Now, are you the sister to one Minnie Harley? A. Yes.

Q. I will ask you if during the month of March, 1955, you loaned a coat, or your coat, to your sister. A. Yes.

Q. And about when did you first lend it to her? A. I don't know when I lent it to her but all this happened around about the same time.

Q. Now, do you recall on the night of Friday, March 11th, that there was some difficulty concerning this coat? A. I don't remember what day it was. I remember I did let her have a coat.

Q. Now, you let her have the coat and there came a time when you
273 went into the restaurant and obtained your coat? A. That is right.

Q. Now, do you remember what day that was? A. No, I don't.

Q. Was it prior to Friday, March the 11th? A. I don't remember the date.

Q. Pardon? A. I do not remember the date.

Q. Well, now, on the day following this difficulty you had some conversation with your sister, did you not? A. Conversation?

Q. Yes; about the coat. A. No. But when I first remember about the coat Mr. Hilton mentioned something about the coat and I told him I had the coat, and I hadn't said anything to her about the coat, because I didn't know all that difficulty had--

Q. Now, you saw Officer Hilton the next morning? A. I don't remember when it was. I remember he is the first one mentioned about the coat.

Q. Could that have been on a Saturday? A. I don't know what date it was.

Q. Did he ask you about the coat at that time or did you tell him about it? A. He mentioned about the coat and in what form I don't remember, but I know the coat was mentioned and I told him I had the coat
274 myself. He said did I know about others too, and I said no.

Q. You told him you had had the coat for several days, didn't you? A. I don't know how many days. I don't know if it was several days, but I remember I told him I had the coat myself.

Q. As a matter of fact, you had it more than one day at this time--

THE COURT: Now, this is your witness, Mr. Harris. You have cross-examined pretty thoroughly.

BY MR. HARRIS:

Q. You had the coat more than-- A. I don't know. I told you that.

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275

KENNETH G. BROWN

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DIRECT EXAMINATION

BY MR. HARRIS:

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Q. And you are a doctor of medicine? A. I am.

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Q. Doctor, do you know this defendant, Robert P. Galloway, Jr.?

277 A. I do.

Q. Directing your attention to March the 14th, or March the 12th, did you have an occasion to see him on that date? A. If I might refer to my notes to make sure about that: Yes; on March 12th I did.

Q. Now, did you examine him at that time, Doctor? A. I did.

Q. Will you state the results of your examination at that time? A. I examined this young man at my office. He stated that he had been injured on the day before. I found him to be suffering from-- or to give evidence of suffering from a severe bruise to the jaw over the right cheekbone. I examined this and there was discoloration, swelling of the face on that side. The boy also complained of some pain in his left hip.

If I might digress for just a moment, I had operated on this young man in January of this year in one of the hospitals here following a fracture of his hip joint, at which time he was having some pain, and I pulled a steel pin that we had put in his hip previously, pulled it back a bit to
278 relieve this pain. On so examining this hip this day I found him again to be suffering from some muscle spasm, evidence of pulling of some of the ligaments and tendons of the previously injured joint.

So my assumption was that this boy was suffering from a strain, a

type of injury causing strain to the previously injured hip. Also there was a laceration of the lip, about the mouth on the inside, the lower lip.

Q. And did you treat him for those conditions that you have enumerated? A. I did.

Q. And do you recall how many times you saw this defendant? A. No, I don't. I think, to be nearly exact, it was about four times. I X-rayed him and found out that there were no fractures to the bones of the face, and I re-examined his hip joint and found out that there had been no disturbance of the alignment of the hip as we had left it at the time of operation, and after his mouth and all had healed, why, we discharged him as improved. But I assume that it was probably four times that I saw him. * * *

CROSS EXAMINATION

BY MR. CAPUTY:

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281 Q. Now, do you remember, Doctor, talking to FBI agents on March the 17th? A. I remember talking to two men who came to my home, yes.

* * * * *

Q. Now, did you tell the agents at that time when you talked to them that you saw no contusions or bruises on the defendant's face? A. I did not.

Q. You didn't tell them that? A. I did not. If they said that, it is a misstatement.

282 Q. Now, did you tell them at the time when you talked to these agents, that the defendant Galloway had quite a noticeable swelling on the right side of his face? A. I told them that he had a swelling; that there was evidence of injury to the right side of his face; yes.

Q. You told them that? A. I did.

Q. Now, didn't you only tell them, Doctor, that he just had a slight swelling or lump above one eye? A. I don't remember of telling them but I might have told them that.

Q. You didn't tell them anything about noticeable swelling on the

right side of the face, though, did you, Doctor? A. Well, I don't know whether I did or whether I didn't. I don't remember writing anything down. That is just what I said.

Q. Now, when you were talking to the FBI agents were you talking to them from the chart or card that you had concerning the treatment of this defendant Galloway? A. That I don't remember either. * * *

283 Q. And did you tell the agents that that small cut on the inside of the mouth could have been caused by the teeth? A. I might have told them that. It could have been caused by a tooth.

Q. Now, you say you found something wrong with the defendant's hip? A. Evidence of straining on the left hip, yes.

Q. What do you mean by that, Doctor? A. Some muscle spasm. Well, the thing that attracted my attention to that, sir, was the fact that the boy complained of some pain in his hip, and as I told you, I had operated on this boy previously, in January, at one of the hospitals here, and so, of course, it was my duty to re-examine the boy's hip since he was complaining of pain.

Q. Well, now, when you examined him in January didn't you examine him to remove a pin from the hip there--when you operated on him, rather? A. In January I operated because this boy had been complaining of some pain in this hip. There had been a previous operation some couple of years ago. So I didn't remove the pin; I pulled it back; I didn't take it out completely because I didn't think that the neck of the femur was sufficiently strong to take the pin out completely and I pulled it back and cut it off.

284 Q. You removed the metal pin, didn't you? A. I didn't take it out completely.

Q. Did you tell the FBI agents that you operated on him a couple of months prior to the time they talked to you and that you removed the metal pin? A. I don't remember whether I did or whether I didn't. I know I didn't tell them that I removed the metal pin because I did not remove it; I just pulled it back, cut it off.

Q. Now, isn't it true that the only thing that you told the FBI agents is what I have enumerated, that there were no contusions and just a slight

swelling? A. I wouldn't say that.

Q. And in addition you told them that he had a bruise about one inch to one and a half inches on the forehead, with a scratch mark through it? Do you remember telling them that? A. I wouldn't say that that is all I told them. If I told them anything I certainly did mention this injury to the side of the boy's face because there was definite evidence of it.

* * * * *

285 Q. You are the family physician, aren't you, Doctor? A. I have been for years, yes.

Q. Now, when he came into your office on March the 12th he walked without any trouble, did he? A. He walked in; yes.

Q. And he walked out without any trouble, didn't he? A. But he was still limping a little.

Q. Beg pardon? A. He was still limping slightly.

Q. Was he limping when he walked in, too? A. Oh, yes.

Q. How much of a limp, Doctor? A. Well, if you want it in percentage I would say a ten per cent limp.

Q. Now, is that limping enough to keep him at home, Doctor? A. I wouldn't say that it was.

Q. He could go about his duties, and shoot pool? A. I would say he could--I don't want to say anything about shooting pool but I would say he could be out; yes.

MR. CAPUTY: That is all.

REDIRECT EXAMINATION

BY MR. HARRIS:

286 Q. Now, Doctor, this injury to the lip: Could that injury have been caused by a fist forcibly struck against the mouth? A. Could have been caused by any force against the mouth that forced the lip forcibly against the front teeth.

MR. HARRIS: That is all.

RECROSS EXAMINATION

BY MR. CAPUTY:

Q. It could have been caused by someone holding him from behind with his arms, couldn't it, Doctor? A. If there was sufficient pull on the mouth to pull the lip into the tooth violently, yes, it could tear it.

Q. Now, Doctor, this condition that you noticed about his hip, that he limped a little bit, could that have been caused by his violent kicking or being dragged down the stairs? A. It could have been caused by any undue force on the hip joint at that time pulling on the limbs.

Q. Yes. If he kicked and kicked many times, it could have caused it, couldn't it? A. He would have to kick pretty hard.

Q. Well, it could have happened that way, couldn't it? A. I would say yes; but it is rather unusual.

Q. And it could have happened, too, if he had such a condition as you described, it could have happened when he was being dragged down a
287 flight of stairs, couldn't it, Doctor? A. That could have caused it, yes.

MR. CAPUTY: That is all.

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289

ROBERT P. GALLOWAY, JR.,

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DIRECT EXAMINATION

BY MR. HARRIS:

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Q. Where do you go to school, Robert? A. At Phelps Vocational High.

Q. I will ask you, sir, if on March the 11th, 1955, you were in Thelma's Restaurant in the 2400 block of Nichols Avenue Southeast. A. Yes, I was.

Q. And about what time was that, sir? A. At approximately 6:30.

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Q. And were there other persons in the restaurant at the time that you were there? A. Yes, there were.

Q. Now, did there come a time when you left, sir? A. Yes, I did.

Q. And did you leave in the company of any persons? A. If I am not mistaken I left by myself.

* * * * *

BY MR. HARRIS:

Q. Did there come a time, sir, when you went to your mother's place of business to pick her up? A. Yes, there did.

Q. And about what time was that? A. That was about 9--between 9 and 9:15.

Q. And incidentally, where is that place of business located? A. 2345 Nichols Avenue Southeast.

291 Q. And how far is that from the Number 11 Precinct? A. About a block.

Q. And what type of business is it? A. It is a whiskey store.

Q. Now, did you take your mother home? A. Yes, I did.

Q. Were you in the company of any other person? A. Yes; I took my mother home, Randolph Chase, and our dog.

Q. About what time did you arrive home? A. I would say about 9:20, 9:25 close to 9:30. In that time.

Q. Did there come a time when you left your home again? A. Yes, there did.

Q. And did you leave with any other person? A. Yes; with Randolph Chase.

Q. At that time where were you going? A. I was on my way in town.

Q. Where was Randolph Chase going? A. He was going to ride in town with me.

Q. Now, did there come a time when you saw Officer Glen Hilton? A. Yes, I did.

292 Q. And where did you see him? What were you doing at the time that you saw him? A. Well, when I saw him I slowed down, didn't make a complete park, pulled into the curb but not all the way, because I was going to pull right back out, and so he came to the car and said, "I have orders to bring you in" and I said "What for?" He said "I can't tell you." So I asked him would it be all right if I could park my car over in front of my mother's store and walk to the precinct with him, and he agreed to that.

Q. And did you ask him again why he was taking you in? A. Yes, I did.

Q. And what, if anything, did he say? A. He said he couldn't tell me.

Q. Now, after that happened, tell the ladies and gentlemen of the jury what transpired, if anything, between yourself and Officer Hilton.

A. Well, we walked from Talbert Street almost to Chicago Street where we went into the side entrance of the precinct.

Q. On your way to the precinct did you see anybody? A. Yes, I did.

Q. Who? A. I saw my brother.

293 Q. And did you have conversation with him? A. Yes. He was riding by in a car but when he saw me walking with the policeman, he slowed down and asked me--I told him to go home and get my mother because the policeman had me and I didn't know what he had me for.

Q. About what time did you arrive at Number 11 Precinct? A. Approximately 9:30 or 9:35; somewhere in that neighborhood.

Q. At the time that you walked into the precinct had Officer Hilton at that time told you why he was bringing you in? A. No; he did not.

Q. Between the time that you left Talbert Street and walked the one block over to the precinct, did you curse Officer Hilton? A. No, I did not.

Q. Did you use any profanity? A. No, I didn't.

Q. Did you have any discussion with Officer Hilton whatsoever?
A. Like I said before, I just kept asking why was he arresting me, because I hadn't done nothing, and what did he want with me.

294 Q. And what, if anything, did Hilton say to you? A. He said "I can't tell you."

* * * * *

Q. When you got inside, what, if anything, did you do? A. I didn't do nothing. He said "Upstairs", and I walked on upstairs. He pointed toward the stairway.

Q. Did Officer Hilton walk behind you? A. Yes, he did.

Q. Now, when you got to the top of the stairs what, if anything, happened? A. When we got to the top of the stairs, he turned to the right and there was a room there and he said, "In here." So I went on in the room and Officer Denton was in there at the time. He told me to have a seat. First he spoke to me and then told me to have a seat. * * *

295

BY MR. HARRIS:

Q. Now, who else was in that room? A. Officer Denton, Officer Barbour, and Officer Hilton and that man down there with the gray coat on. At first I didn't know what his name was but I know his name now. That's him.

* * * * *

THE COURT: Officer Gerber. Is that agreed?

MR. HARRIS: All right; Officer Gerber.

BY MR. HARRIS:

296

Q. What, if anything, were these officers doing at the time--in the room at the time you came in? A. When I came in most of them stood up. If I am not mistaken it was two uniformed policemen in there too, but I am not too sure since it has been so long. But I remember seeing the three detectives and Officer Hilton.

Q. What was said to you immediately upon your entrance? A. First when I entered Officer Denton spoke to me and then told me to sit down.

Q. And where were you seated? A. Over by the window, on the far end of the room where, as you go in.

Q. While you were seated where was Officer Gerber? A. I believe he was at the desk. I am not sure exactly where he was. I am not sure of the exact location where he was.

Q. Now, did there come a time when you had some conversation with Officer Barbour? A. Yes, I did.

Q. When was that? A. That was after--I believe it was Officer Denton asked me about a coat and I told him I didn't--

Q. Officer who? A. Officer Denton.

Q. Officer Denton asked you about the coat? A. That is right.

Q. Exactly what did he say to you about the coat? A. Well, he said, "You know why you are down here?" I said "No, I don't." Then
297 he mentioned the coat. I said "Like I told you, I told the lady, I don't know anything about no coat."

Q. And that was Officer Denton? A. That is right.

Q. Now, what, if anything, did Officer Barbour say? A. So Officer Barbour says "Boy, you don't know who you are talking to, do you?"

Q. And what, if anything, did you say? Tell us the whole conversation, exactly what happened. A. So I said "Well, you could call me by my name. Call me Robert Galloway," just like that; and he hit me in my face and when he hit me in my face I jumped up and hit him back and that is when Officer Hilton grabbed me and snatched my glasses off and all of them started beating me.

Q. After they started beating you what happened next? A. Well, Officer Hilton drug me down the steps and they were beating me all along as I was going down the steps and I was hollering and kicking and trying to get loose.

Q. Did there come a time when you got to the ground floor? A. Yes, there did.

298 Q. What, if anything, happened down there? A. Well, when I got to the ground floor I was still kicking. This policeman ran up to grab me, all of them was grabbing, you know, grabbing at me but I was still kicking trying to get a-loose, and the next thing I knowed I saw him fall to the floor, and then they took me to the cell block and arrested me; you know, put me in and locked me up.

Q. Who took you to the cell block? A. Officer Hilton, Officer Barbour, and, let me see--I don't know exactly the other policeman; but I believe it was about--I will say it was approximately four policemen.

Q. Now, while you were being put into the cell block and immediately thereafter, what, if anything, happened? A. I could hear somebody hollering, "Barbour, Barbour, don't do it." Just like that; and as I looked up; I was in the cell block; and he ran toward the cell and pointed

a gun at me hollering, "I will kill the little bastard. I don't care who he is. He can't do this to me."

Q. And what happened then? A. And the whole time I was screaming for my mother because I heard her voice up front after I had got there in the back cell block.

Q. Now, did Officer Barbour remain back there in the cell block?

299 A. No, he did not.

Q. What happened? A. When I noticed, the policeman was pushing him away, Officer Hilton was.

Q. Now, did there come a time when you talked to Sergeant Gernhofer? A. I am not sure whether that was him or not.

Q. Did you talk to the lieutenant, Lieutenant Myers? A. Yes, I did.

Q. What did the lieutenant say to you and what did you say to the lieutenant? A. Well, the lieutenant asked me how it happened and what had happened, and I told him, and he asked me was I hurt, and I told him yes, I would like to go to a hospital.

Q. And did the lieutenant send you to the hospital? A. I would say about maybe 15 or 20 minutes after I talked to him they put me in a patrol wagon and took me over to D. C. General.

Q. When you got to the hospital what happened over there? A. Well, they locked me up in a cell over there. So I had to wait around almost an hour, somewhere in the neighborhood of an hour.

300 Q. And did you see anyone at the hospital? A. You mean where I was locked up or what?

Q. Yes. Did the doctor come to see you? A. Sir?

Q. Did a doctor come to see you in the cell? A. No. He just looked in; that's all. Then after that, after I waited around a while, they took me over to the room across from there and the doctor felt me, felt my arms and felt my legs, felt me, and looked at the cut in my mouth and says "He is all right". And that was all there was to it.

Q. What was actually wrong with your mouth at that time? A. It was cut on the inside.

Q. And how had that cut been caused? A. It was cut--it had to have been cut from where I was hit, because I was hit in the face, and all over my sides and all through here. (Indicating).

Q. Do you know how many times you were hit? A. No. I don't.

Q. Do you know how many people hit you? A. Everybody that was in the room, except Officer Hilton.

Q. Now, when Private Paul came over to grab your legs with a group of officers, had you determined that you were going to kick Private Paul? A. The main reason for me kicking was I was trying to get
301 a-loose because they had been beating me so bad; what else could I do?

* * *

CROSS EXAMINATION

BY MR. CAPUTY:

* * * * *

302 Q. When you got up to the detective room of Number 11 precinct, with Private Hilton, how many plainclothesmen were there? A. Three.

Q. And he was one of them? A. That is right.

Q. Uniformed officers there at the same time? A. I said I believe so but I am not sure. I think it was two.

* * * * *

310 BY MR. CAPUTY:

Q. Now, what was the first thing that Detective Denton asked you?
A. He asked me about the coat.

Q. Go ahead. A. And I told him like I told the woman, that I didn't know anything about the coat and I didn't know why they had me
311 here, because I didn't know anything about the coat, like I-- just the same way I told the lady, I told him, that I didn't know anything about the coat.

Q. Now, how long did that take, that questioning by Detective Denton? A. About two or three minutes; maybe not that long.

Q. And did Detective Barbour question you also? A. No; he did not.

Q. Now, is it your testimony that Detective Barbour struck you without saying a word to you? A. Like I told you before, when I told

Officer Denton that I didn't know anything about the coat and I didn't know why they had me there for something like that, something on that order, and he hit me in my face and when he hit me, I hit him back, and that's when Officer Hilton snatched my glasses off and grabbed me from the back.

Q. And when you were hit in the face you were seated in the chair; is that right? A. That's right; I was.

Q. And you leaped up from the chair; is that it? A. I wouldn't call it what you call, leaped up. I got up.

Q. You got up from the chair? A. That is right; I did.

312 Q. You struck Detective Barbour? A. That is right; after he--

Q. How many times? A. I don't know.

Q. Was it more than once? A. I couldn't say.

Q. Now, is it your testimony that you struck Detective Barbour right there and then in the presence of three uniformed officers and Sergeant Gerber and Denton? A. And Officer Hilton.

Q. And did they all take hold of you at the time that you struck Detective Barbour? A. As soon as I struck Detective Barbour, the officer grabbed me from the back and everybody started beating me and I was kicking, trying to get a-loose..

Q. They all beat you? A. That's right; they did.

Q. Did Officer Hilton take off your glasses? A. Yes, he did.

Q. When? A. When? When I jumped up and hit Officer Denton-- Officer Barbour.

313 Q. And how did he take them off? A. Snatched them off and grabbed me from the back and put a--went up under my arms and had my arms and my head.

Q. Now, prior to the snatching of the glasses by Officer Hilton, other than Detective Barbour, no other officer had hit you yet; is that right? A. That is right.

Q. Now all this beating took place after Officer Hilton took off your glasses? A. That is right; it did.

Q. How many times would you say you were struck? A. I told

you I don't have no idea.

Q. Well, can you tell us approximately how many times? A. No, I couldn't.

Q. Were you struck in the face? A. Yes, I was.

Q. How many times? A. I told you I couldn't tell you. I was--

Q. Well, was it more than once? A. Yes; it was more than once. I was beaten up--

Q. Was it a dozen times? A. More than a dozen times. I guess it was about a thousand times. Felt like a million times to me.

Q. Would you say it was about a thousand times you were struck?

THE COURT: He said about a thousand.

THE WITNESS: I believe it was more than that.

314 THE COURT: More? Excuse me.

BY MR. CAPUTY:

Q. More than that? A. I tell you, everybody was beatin' me. I don't know how many times I was hit.

Q. You said about a thousand times. A. I said it could have been a million; maybe a million; I don't know.

* * * * *

BY MR. CAPUTY:

Q. And of those thousand blows many were in your face, weren't
315 they? A. Face and stomach and all around through here.

Q. Many of them in the face. Now, did you have any black eyes?
A. No; my jaw was swollen; and my mouth.

Q. Did your nose bleed? A. Yes, it did.

Q. It did? A. Yes, it did.

Q. And when did it stop bleeding? A. When did it stop bleeding?

Q. When; yes. A. When I wiped it; that's when it stopped.

Q. Well, did you wipe it in the room there? A. No; in the cell block.

Q. And was it bleeding from the time you were being taken down-stairs from the detective room to the time that you went into the cell block? A. It was, a little bit; not too much.

Q. What? A. It didn't bleed too much. It bled a little bit.

Q. Now, did you have any blood on your clothes? A. I don't remember.

* * * * *

316 Q. Let me ask you this: Were you knocked out with a thousand blows that you had received? By about six officers? A. No, I wasn't knocked out but I was in a daze-like.

Q. Were you on your feet? A. I was on my feet but I knew exactly what I--I was trying to get loose. The main thing I was trying to do was get loose when they started beating me.

Q. Now, had you received about a thousand blows before you kicked Detective Barbour? A. During the time when Detective Barbour got kicked, everybody was beating me and I was trying to get a-loose.

317 Q. But you remember kicking him, don't you? A. They said I kicked him. I don't--the only policeman I remember getting kicked was Officer Paul, and I didn't even know him.

Q. Isn't it a fact that no officer placed his hand upon you, and you, for no cause whatsoever, struck Detective Barbour in the face? A. I struck him after he hit me.

Q. And isn't it true that after that Officer Hilton took hold of you and pushed you against the wall? A. No, it is not true.

Q. And isn't it true, then, that when he was leading you out, you kicked Detective Barbour in the groin? A. That is not true either.

Q. And that he doubled up and then you kicked him again in the face? A. No; that is not true neither.

Q. It isn't? A. No, it is not.

Q. Now, how many officers brought you downstairs? A. Let me see. Officer Hilton was dragging me and the others were beating me.

Q. Were you being beaten as you were being dragged down the stairs? A. Yes, I was.

Q. And by how many? A. Six.

318 Q. The same ones that were in there? A. That is right.

Q. The uniformed officers? And the other detectives? A. That

is right.

Q. Did that beating take place from the second floor down to the first floor? A. Yes, it did.

Q. And you were still on your feet? A. I was not on my feet. I was being dragged.

Q. And being hit? A. That is right.

Q. Now, when you were asked to go to the station by Officer Hilton, isn't it true that you said to him, "I am tired of this stuff. You always pick on me" and that you cursed? A. No; that is not true neither.

* * * * *

320

BY MR. CAPUTY:

Q. On your way to the station did you tell Officer Hilton that you were tired of this and that they were picking on you whenever anything happens, and that you cursed as you said that? A. No, I did not.

Q. And isn't it true that as you were walking to the station, that Officer Hilton said--just as you were about to enter the station, "I am charging you with disorderly conduct"? A. He didn't tell me nothing like that.

Q. He didn't tell you that? A. No, he didn't.

Q. Now, what time did you finally get home on March the 12th?
A. It was between two and four o'clock.

Q. You can't do any better than that? A. No, I can not.

Q. Was Randolph Chase with you, too? A. Yes, he was.

Q. Now, did you go home with your mother? A. Yes, I did.

Q. And then you took Randolph Chase home? A. That is right.

Q. Did you stop anywhere? A. No. I rode to Nichols Avenue.

321

I slowed down but I did not stop.

Q. Did you stop at Thelma's Restaurant? A. No, I did not.

Q. You didn't stop there? A. No. I slowed down; that is all.

Q. Now, did you tell the -- strike that, please. Do you recall talking to FBI agents on March the 15th by the name of Nagle and McGahey?
A. I talked to two FBI agents but I don't know the exact date I talked to them.

Q. Did you tell them that around two-15 or two-thirty you stopped at Thelma's Restaurant to talk to a friend? A If I did I can't recall it.

* * * * *

323

BY MR. CAPUTY:

Q. Do you recall kicking an officer on the first floor and an officer falling down? A. Yes, I do.

Q. What? A. Yes, I do.

Q. Now, that officer hadn't placed his hands on you at that time, had he? A. At the time I was kicking, trying to get loose and he was reaching for my leg.

THE COURT: That isn't the question, sir. The question is, had that officer put his hand upon you at that time.

THE WITNESS: No, he hadn't.

BY MR. CAPUTY:

Q. Is it true that you kicked him just as he was coming out of the railing? A No, it is not.

* * * * *

325

BY MR. CAPUTY:

Q. As you were being placed in the cell you saw Detective Barbour with a gun? A. No; I was already in the cell.

Q. Did you see the gun in his hand? A. Yes, I did.

Q. Was he at the cell door when you saw him with the gun? A. Yes. He was.

Q. As you were placed in the cell itself, Detective Barbour was
326 right there at the door and he had the gun in his hand? A. I had been in the cell before he appeared with the gun.

Q. Now, did anyone push Detective Barbour out of the cell block?
A. Yes, they did.

* * * * *

329

REDIRECT EXAMINATION

BY MR. HARRIS:

Q. Now, did Officer Hilton take you to the sergeant's desk or to the railing for the purpose of booking you at any time? A. No, he did not.

Q. Well, did there come a time when you were taken to the book and certain questions were asked of you? A. Yes, it was.

Q. When was that? A. After I arrived--after I got back from the hospital.

* * * * *

330

BY MR. HARRIS:

Q. What time was that, Robert? A. About between 12 and 12:30;
331 somewhere in that neighborhood.

Q. And do you recall who asked you the questions? A. The man behind the desk, the officer behind the desk.

Q. And do you recall what was asked you? A. Yes, I do.

Q. What did he ask you? A. He asked me my name, address, age, my birth date, my mother's name, sister's name, my brother's name and my father's name.

Q. And after that what happened? A. After that I was transferred to Number 1 Precinct.

* * * * *

RECROSS EXAMINATION

BY MR. CAPUTY:

Q. You say you were booked after you left the hospital? A. Yes, sir.

Q. Around a quarter to one; is that your testimony? A. Approximately.

Q. Now, isn't it true that you were booked at 9:55? A. No, it is not.

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357

JAMES T. TRUMAN

* * * * *

DIRECT EXAMINATION

BY MR. HARRIS:

* * * * *

Q. Officer, I hand you what purports to be a patrol system book and ask you if you are familiar with that book, sir. Yes, sir.

Q. Is that book kept in the normal and ordinary course of business at Number 11 Precinct? A. Yes, sir.

358 Q. I direct your attention, sir, to the page relating to March 12, 1955, and I show you an entry marked "2:15". Would you read that entry, sir? A. "2:15. Robert P. Galloway, prisoner, returned to Number 11 Precinct."

Q. Now, that would indicate 2:15 a. m., would it, sir? A. Yes, sir.

Q. On the morning of Saturday, March 12, or the night of March 11? A. Yes, sir.

Q. And was that entry made at the time he was returned from the hospital? A. Yes, sir.

Q. And that reflects the true record of the time that he came from the hospital? A. Yes, sir.

* * * * *

360 Q. Now, I will ask you: From that book will you tell me, sir, how many people were booked in Number 11 Precinct between the hours or after the hour of 9:55 a. m. on Friday, March 11, to and including 11:45 a. m. the next morning, Saturday morning, March 12th? A. From 9-- when was that again, sir?

Q. 9:55 Friday night until 11:45 a. m. Saturday morning.

* * * * *

361 BY MR. HARRIS:

Q. After 9:55 p. m. on Friday, March 11th to and including 11:45 a. m. the next morning, Saturday, March 12th. A. Well, there were two. It was 11:40 a. m., March 12th. From 9:55 until 11:40 a. m. March the 12th, there was one other case booked.

Q. One arrest? A. Yes, sir.

* * * * *

363 MR. HARRIS: May I show it to the jury?

THE COURT: Yes. You can show it to them. Suppose you wait until cross-examination and you might be able to do both at the same time, sir.

MR. HARRIS: Very well.

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365 (Precinct book exhibited further to jurors.)

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366 CROSS EXAMINATION

BY MR. CAPUTY:

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367 Q. Do you know, Officer, whether that 2:15 there was made at the time that the prisoner was actually brought into the station or could it have been made, let us say, two hours after he was brought into the station? A. It could have been made later than the actual time he was brought into the precinct.

Q. So it doesn't necessarily mean that the time 2:15 shows that it was the time that he was actually brought into the station? A. That's correct; yes, sir.

THE COURT: I don't understand you, sir. What does it mean, if anything? What does 2:15 mean?

THE WITNESS: 2:15 a. m., sir, is when the prisoner was brought back to Number 11 Precinct, sir.

THE COURT: That is what he said before.

MR. CAPUTY: Well, my question, again, is:

BY MR. CAPUTY:

368 Q. Could the 2:15 mean that it was the time that the entry was made by the officer who made it, and not necessarily the time that the person was brought into the station? A. Well, it should mean the time that the prisoner was brought back to the precinct.

* * * * *

369 THE COURT: Ladies and gentlemen, the clerk advised me that one of you jurors desired to have the holster to see the holster of Officer Barbour's gun. I called in Mr. Harris and Mr. Caputy and asked if either of them had any objection to it being displayed. Both of them agreed that it should be displayed.

* * * * *

THE COURT: Can we agree that this is the gun, gentlemen, to save time?

MR. HARRIS: I will stipulate that is the gun and the holster he had on the night in question.

MR. CAPUTY: Yes.

* * * * *

370 (Bench conference:)

MR. HARRIS: I have closed my case and for the record I desire now to move for a judgment of acquittal on the grounds previously stated by me at the close of the Government's case.

THE COURT: I will deny it.

MR. HARRIS: Mainly, that this thing stemmed from an illegal arrest, and the Government has not shown even a prima facie case that this defendant did not act in pursuance of a resisting of the unlawful custody and unlawful arrest.

371 THE COURT: I will deny that because I think there are certain facts which should be determined by the jury.

(Open Court:)

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EVIDENCE IN REBUTTAL ON BEHALF OF THE
GOVERNMENT * * *

TALMADGE P. DENTON

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and assignment? A. Talmadge P. Denton, assigned to the Eleventh Precinct as a Precinct Detective.

* * * * *

372 Q. Now, when you went to the Eleventh Precinct did you at any time go up to the detective room on the second floor? A. No, I didn't.

Q. And at the Eleventh Precinct did you see the Defendant Gallo-way? A. No, I didn't see him. * * *

Q. What time did you say you went to the Eleventh Precinct? A.

373 It was about five minutes after eleven. I imagine it took about five minutes to get from Peoples Drug Store at Nichols Avenue and Good Hope Road to the station.

THE COURT: Five minutes after what, sir?

THE WITNESS: About five minutes after ten.

* * * * *

CROSS EXAMINATION

BY MR. HARRIS:

Q. Officer Denton, did you see Mrs. Eulalia Galloway Toland in the precinct that night? A. Mrs. Toland?

Q. Yes. A. Yes, I did. I talked with her.

* * * * *

374

GLEN A. HILTON

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY: * * *

Q. Did you hear the testimony of the defendant and also the testimony of the defendant's mother and Randolph Chase, sir? A. Yes, I did, Mr. Caputy.

Q. Did you hear them testify, sir, that in the cell block you were pushing Detective Barbour and another officer out of the cell block? A. Yes, I did.

Q. Did you push the officer out of the cell block? A. No, sir.

Q. Now, it has been testified that you uttered the expression,
375 "Don't, don't." Did you utter that expression, sir? A. No, I didn't.

* * * * *

BY MR. CAPUTY:

Q. Did you see a gun in Detective Barbour's hand? A. After I told the--yes.

Q. Now, did you see a gun on the floor? A. Yes.

376 Q. And after you saw that gun on the floor what did you do with it?
A. I picked it up and handed it to Officer Barbour.

Q. And what did he do with it at that time? A. He took it and I don't know if he put it in his holster or in his belt, or pant line.

Q. When you picked up that gun, where was the gun when you picked it up? A. On the floor, sir.

* * * * *

377

CROSS EXAMINATION

BY MR. HARRIS:

Q. Now, Mr. Glen Hilton, you were asked about a gun on Friday, weren't you? Didn't I ask you about the man's gun? A. Yes, you did.

Q. Why didn't you tell us at that time about picking the gun up and handing it to him? A. You didn't ask me that, Mr. Harris. You asked me did I--

* * * * *

380

CHARLES F. SULLIVAN

was called as a witness by and on behalf of the Government, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. State your name and assignment, sir. A. Private Charles F. Sullivan, assigned to the Identification Bureau of the Detective Bureau.

* * * * *

381

Q. Now, during the course of your official duty in the Identification Bureau of the Metropolitan Police Department, did you see the defendant, Galloway? A. Yes, sir, I did.

Q. And at that time did you take pictures of him, sir? A. Yes, sir. I fingerprinted him and took his picture. * * *

(Bench conference:)

MR. HARRIS: I would like to know what his purpose is.

THE COURT: To show his physical condition, I guess.

MR. CAPUTY: Face; yes. His pictures taken at the time.

THE COURT: Such injuries, if any, that he had at the time he was
382 at the precinct.

MR. CAPUTY: That is right.

MR. HARRIS: I don't think he will be able to show his picture--I don't think you can introduce it against him when it is not with his consent.

THE COURT: I will hold he can, sir.

MR. HARRIS: I object.

(Open Court:)

* * * * *

BY MR. CAPUTY:

Q. Now, particularly with the Defendant Galloway, you took pictures of him, sir? A. Yes, sir, I did.

Q. Now, how did you take the pictures? A. That is the ordinary
383 gallery photo of the front view and then turn and get the right side.

Q. And then did you develop that? A. Yes, sir, I did.

Q. Do you recall what time you took the picture? A. I believe it was about 2:30 a. m. on March the 12th of 1955.

Q. Now, were these black and white pictures, sir? A. Yes, sir; that is correct.

Q. Did you take any color pictures? A. Yes; I took a color stand-up.

Q. At the same time, sir? A. At the same time, yes, sir.

* * * * *

385 MR. HARRIS: May I ask a preliminary question, your Honor?

THE COURT: Yes; certainly.

* * * * *

MR. HARRIS: Now, you are familiar with a process known as retouching, are you not, sir?

THE WITNESS: That is correct, sir.

MR. HARRIS: Now, when you retouch, I will ask you, is it easier, sir, to retouch an enlargement than it is on the original print?

THE WITNESS: It is to retouch the picture; yes, sir, but to retouch
386 the negative, no. The negative would show it.

MR. HARRIS: I am talking about the picture. You take an enlargement and get an enlarged print; isn't that retouched much more easily than the original print?

THE WITNESS: It is easily distinguishable on the picture; yes, sir.

MR. HARRIS: Now, I will ask you, sir, in an enlargement is it possible to distort the enlarged print?

THE WITNESS: It is, but you would have to distort the negative.

* * *

MR. HARRIS: Would you have to do anything that would permanently physically affect the negative?

THE WITNESS: Yes, sir; that is true.

* * * * *

387 MR. HARRIS: Have you ever retouched a picture?

THE WITNESS: No, sir, I have not.

MR. HARRIS: Don't know anything about that?

THE WITNESS: No, sir, I don't.

* * * * *

389 BY MR. CAPUTY:

Q. Or touch it up in any way? A. No, sir. I have not. This is the exact duplicate of the smaller one.

* * * * *

391 MR. CAPUTY: I would like at this time, if your Honor, please, to offer Government's Exhibits 2, 3, 4 and 5 into evidence as Government's Exhibits 2, 3, 4 and 5.

MR. HARRIS: I object to 2, 3, 4 and 5.

THE COURT: What is your objection, sir?

MR. HARRIS: My objection is that two, three and four purport to be enlargements, and it is well known that enlargements can be distorted. I don't see the value of that.

THE COURT: Is that your objection?

392 MR. HARRIS: Yes, sir.

THE COURT: I will deny the objection and receive them.

(Government's Exhibits 2, 3 and 4
received in evidence.)

* * * * *

393 (Government's Exhibit Number 5 was
received in evidence.)

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(Pictures and viewer exhibited to the jury.)

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413

ROBERT C. NAGEL

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and business or occupation? A.

Robert C. Nagel. I am a special agent, Federal Bureau of Investigation.

* * * * *

Q. Did there come a time that you talked to Robert P. Galloway?

A. Yes, there was.

* * * * *

414 Q. And in that interview that you had with the defendant, did you talk to him about something that occurred at Number 11 Precinct? A. Yes, I did.

Q. Now, did he tell you, sir, how many people were in the detective room? A. Yes, he told me.

Q. At the time that he was allegedly beaten, sir? A. That is right.

Q. How many people did he say were in the detective room? A. He told us there were three plainclothesmen and one uniform detective--one uniformed officer.

Q. Did he tell you who struck him, sir? A. He claimed that the three plainclothesmen struck him, but not Private Hilton.

415 Q. Did he at any time tell you that in addition to Private Hilton, that there were other uniformed men in the detective room, sir? A. No; he just said that there was just those three.

* * * * *

BY MR. CAPUTY:

Q. In telling you about the injuries sustained, did he say that he had sustained any injury of the jaw, sir? A. Yes.

Q. And what did he say about that? A. He said that his jaw was dislocated.

Q. And did he tell you how he found out about that, sir? A. He said that his doctor told him that.

416 Q. Did he tell you who the doctor was? A. His doctor is Doctor

Kenneth G. Brown, the family physician of Galloway.

Q. Did he tell you, sir, what time he went home after midnight on March the 11th, 1955, sir? A. He said that he left the bondsman's office after being released from the police department, at about 2:30 a. m.

Q. And where did he say he went, sir? A. Well, he proceeded home, or in the direction of home until he got to Thelma's Coffee Shop, where he got off and chatted with some friends at the coffee shop for about fifteen minutes.

Q. Was it inside or outside the coffee shop? A. I believe he said it was outside the coffee shop.

Q. Did he say who was with him at the time that he was going home, sir? A. No; he did not say that.

Q. Did he say he was by himself or was anyone else with him? A. He was going home with his mother.

Q. Now, did there come a time, sir, that you talked to one Randolph Chase, sir? A. Yes.

Q. And when did you talk to him? A. Now I believe that was
417 either March 16th or 17th.

Q. Did you make a memorandum, and is your memory exhausted as to when you talked to him, sir? A. Yes, --

MR. HARRIS: If your Honor please, there is no foundation for that question.

THE COURT: What is that?

MR. HARRIS: He hasn't asked him a question now. He is now asking him if his memory is exhausted.

THE COURT: I thought he was asking as between the 16th and 17th. Is that what you meant, sir?

MR. CAPUTY: Yes.

BY MR. CAPUTY:

Q. Can you recall what day it was? A. I don't remember right offhand.

Q. Did you make a memorandum? A. I would have to refer to that in order to be sure.

Q. At the time you made that memorandum was it the time you talked to Randolph Chase? A. I made notes at the time I talked to him.

Q. Would you say that your recollection is exhausted as to the date that you talked to him, sir? A. I would say so. * * *

418

(Bench Conference:)

MR. HARRIS: Your Honor, I object to the entire testimony of this police officer, not specifically as to statements made by a witness who testified in the case, as to collateral matters. I have already expressed that to your Honor.

I don't believe that what a witness has said after the happening of an event or after the happening of an alleged crime, it does not relate to the crime itself. If he is going to ask him did he see something contrary to what was said to this man, but not what this witness on another and separate occasion said to the agent, I don't believe it is permissible under these circumstances.

THE COURT: I can't very well pass upon that until the specific question is put, can I?

MR. HARRIS: Certainly, your Honor.

THE COURT: I had better wait for that. And as I understand the Ewing case, if it is material to the situation, why, it is not collateral.

MR. HARRIS: If it is not--

419 THE COURT: If it is material to the issues. Now, we have got in this case assault, physical injuries, and things of that sort. But I think I had better say to you, Mr. Harris, that we had better get a specific question and then pass upon it as we reach it.

MR. HARRIS: Certainly these things as to the time the man went home, certainly it is not material to the issue of assault, or material to the issue of an arrest.

THE COURT: It would depend upon how far they go. It may show a lot of things. It may show where he got the injuries, when, and how he was at that time, and I think it is material.

* * * * *

422

(Open Court:)

THE COURT: Come back to the stand, please.

BY MR. CAPUTY:

Q. Will you refresh your recollection as to the date you talked to him?

THE COURT: Are these your own notes, Mr. Nagel?

THE WITNESS: Yes, sir.

THE COURT: All right.

(Refers to notes.)

THE WITNESS: Where are we?

THE COURT: This is as to the time you talked to Randolph Chase.

THE WITNESS: On March the 16th.

THE COURT: All right.

BY MR. CAPUTY:

Q. Who was present with you at the time? A. Special Agent McGahey was with me.

Q. Now, it has been testified, sir, by Randolph Chase, that in that interview that you had with him, in which you were accompanied by Mr. McGahey, that he did not say to you that the defendant seemed to calm down and that Private Hilton released his grip.

423 THE COURT: Now, I don't follow that, sir. Suppose you come to the bench, sir.

(Bench Conference:)

THE COURT: I don't understand you, first.

MR. CAPUTY: It was testified to by Randolph Chase on cross-examination. I had asked him if he had told the FBI if the defendant seemed to calm down and that thereafter Officer Hilton released his grip and that he then squirmed and twisted and Officer Hilton took hold of him again.

THE COURT: Can't you ask him those two specific questions: Did he quiet down; and, number 2, did he lose his grip. Because you lost me in that question.

MR. CAPUTY: All right.

MR. HARRIS: Your Honor, I object to that question, too. Certainly

I feel that this is collateral. Now, what Randolph Chase says certainly isn't material as to the happening of the event. And the calming down certainly isn't material one way or the other.

THE COURT: I will let him answer that.

(Open Court:) * * *

424 MR. HARRIS: May the agent put his notes up, your Honor?

MR. CAPUTY: Put your notes away.

THE COURT: All right, sir.

BY MR. CAPUTY:

Q. Did Randolph Chase say to you in that interview, which was attended by your fellow agent, that the defendant seemed to calm down?

A. He told us that.

Q. And did Randolph Chase in that same interview tell you that Officer Hilton then released his grip of the defendant? A. That's right. That is what he told us.

Q. And did Randolph Chase in that interview then tell you that the defendant squirmed and twisted and Officer Hilton renewed his hold on the defendant? A. That is right, sir.

Q. And in that interview did Randolph Chase tell you that an officer came from behind the railing, and as the officer reached the opening in the rail he was kicked by the defendant in the groin? A. That is correct.

Q. Now, did you have an occasion, sir, to talk to one Doctor
425 Brown? A. Yes, sir.

* * * * *

Q. Now, in that interview did Doctor Brown tell you, sir, that he had operated on the defendant a couple of months previous to the interview, and that he had removed the pin from the defendant's hip?

MR. HARRIS: Now, if your Honor please, I don't know what the purpose of this question is. I mean, the doctor testified that he didn't remove the pin and the pin is still in there. I don't know what this is leading to.

MR. CAPUTY: I think he told just the contrary to the agent.

THE COURT: All right, sir. We will let him answer if he can.

THE WITNESS: Well, I understood Doctor Brown to say--

THE COURT: No, sir, don't tell us what you understood. Tell us what he said, if you remember.

MR. HARRIS: May we have the exact words?

426 THE WITNESS: He said that he removed the pin.

BY MR. CAPUTY:

Q. Now, in that interview did Doctor Brown tell you that he found the defendant to be suffering from or giving evidence of suffering from a severe bruise to his jaw over the right cheekbone? A. Would you restate the question, please?

Q. In that interview did Doctor Brown tell you what the defendant was suffering from a severe bruise to the jaw?

MR. HARRIS: If your Honor please, may we approach the bench?

THE COURT: Yes. * * *

MR. HARRIS: I object to any further questioning concerning anything said by Doctor Brown to this FBI agent on the ground that it would certainly violate the confidential relationship between physician and patient.

THE COURT: Hadn't he broken the privacy when he talked to him?

MR. HARRIS: Beg pardon?

THE COURT: He has broken it himself, hasn't he, by talking to him?

MR. CAPUTY: And he has testified, your Honor.

THE COURT: I think that is too late. But what is this you want,
427 anyway?

MR. CAPUTY: I want to show that he didn't have contusions and bruises as he testified on the stand that he had.

* * * * *

THE COURT: Are you going to try to show the negative?

MR. CAPUTY: Yes.

THE COURT: I won't admit that.

* * * * *

428 MR. CAPUTY: Doctor Brown testified that the man was suffering

from contusions; contusions and bruises; and to the agent he said that he was suffering from no contusions and bruises.

MR. HARRIS: No contusions and bruises.

THE COURT: Well, that is a different thing. Is that a fact?

MR. CAPUTY: That is the fact.

MR. HARRIS: That is what the agent is going to testify to.

MR. CAPUTY: That is what he will testify to.

MR. HARRIS: But that certainly isn't the fact.

THE COURT: Do you object to that?

MR. HARRIS: Yes, sir.

* * * * *

429

(Open Court:)

BY MR. CAPUTY:

Q. Now, did Doctor Brown, Agent Nagel, in the interview with him, tell you that the defendant was suffering from no contusions or bruises? A. He told us exactly that he could not recall seeing any contusions or bruises on Mr. Galloway's face. With one exception.

Q. And what is that exception? A. Well, he mentioned that there was a mark approximately one by one and a half inches above one eye, with a scratch through it. * * *

CROSS EXAMINATION

BY MR. HARRIS:

* * * * *

430

Q. Were you at that time investigating a complaint for, as you say, an alleged violation of the civil rights of Robert P. Galloway, Jr.? A. Yes; that is right, sir.

* * * * *

431

Q. So you did not purport to write down verbatim what the man said? A. No, sir; that is correct.

Q. And as a matter of fact you wrote down your conclusions or generalizations as to the meaning of his language, didn't you? A. Yes, sir.

* * * * *

437

JUDGE'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, the defendant in this case, Robert P. Galloway, is charged with two offenses of assaulting police officers. In Count One, it is alleged the assault took place on Officer Harry Q. Barbour, and in the Second Count there was an assault made upon Officer John B. Paul. It will soon be your duty to determine whether or not the defendant is guilty of the offenses with which he is charged. Before discussing the charges against the defendant in detail, I shall first summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

438

It is the function and the duty of the jury to determine the issues of fact. It is the duty of the Court to instruct you as to the principles and rules of law governing the case. You are bound and obligated to follow the Court's instructions as to the law, but on the other hand, you, the members of the jury, are the sole judges of the facts. You must determine the facts for yourselves solely upon the evidence presented at the trial. Counsel for the Government and counsel for the defense have the right to make opening statements indicating to you what they expect to show. At the conclusion of the case, respective counsel have the right to state to you what in their opinion they have in fact shown.

The Court states to you, however, that statements by Government counsel or defense or for that matter, statements by the Court, do not constitute evidence in the case, and if your recollection be at variance with the recollection of Government counsel, defense counsel, or the recollection of the Court, it will be your recollection which will control, for you are the sole judges of the facts and you will determine each of the facts in conformity with your recollection.

439

The fact that a defendant has been indicted as indicated by the sheet of paper which I held up is not be construed by you as evidence in the case. Its sole purpose is to advise the defendant of the charge or charges which he must face when the case comes on for hearing. It is not evidence in the case. Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to the defendant

throughout the trial. He is not required to prove himself innocent or produce evidence on the subject.

The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt, and unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant committed the crime with which he is charged, and each essential element thereof, then you must find him not guilty as to such charge or charges. You may not speculate or conjecture as to his guilt but you may draw all reasonable inferences from facts which have been proved.

If you can reconcile the evidence in this case with any reasonable hypothesis consistent with the innocence of the defendant you should do so, and in that case your verdict would be "Not Guilty". But you might ask what is meant by the phrase "a reasonable doubt". It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a
440 moral certainty and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence. Therefore, if after an impartial comparison and consideration of all the evidence you can truthfully say that you are not satisfied with the guilt of a defendant, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence you can candidly say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and personal matters of your own, then you have no reasonable doubt.

You are instructed that in a large proportion of cases absolute certainty cannot be expected and although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of your fellows, yet you should examine the question submitted with candor and with a proper regard and deference for the opinions of the other jurors. In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and

weigh all the testimony of all the witnesses who have appeared before you.

441 Inasmuch as you are the sole judges of the facts, so too are you the sole judges of the credibility of the various witnesses who appeared before you. In determining whether to believe the testimony of any witness and in weighing his testimony you may consider his demeanor on the stand, his manner of testifying, whether he impresses you as having an accurate memory and recollection, whether he impresses you as a truth-telling individual, his apparent candor and fairness or lack of it, the interest which he had in the result of the trial of the case, if any, his bias and prejudice for or against the defendant, if any be shown; and his opportunity of knowing the facts and circumstances about which he has testified; and from all the facts and circumstances it is your duty to give the proper weight to the testimony of each and every witness who has testified before you.

You are further instructed that while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and interest in the result of your verdict and all the circumstances which surround him and give to his testimony such weight as in your judgment it is fairly entitled to. If you should find that any witness, or witnesses, whether for the Government or for the defense, has knowingly testified falsely as to any material fact about which he
442 could not have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony or any part of the testimony of such witness except where corroborated by other credible testimony.

There has been introduced testimony with reference to the good character or good reputation of the defendant. Evidence of good character, like other types of testimony, should be considered by you in conjunction with all the other evidence before you. Under some circumstances evidence of good character alone may be sufficient to create in your minds a reasonable doubt, although without it the other evidence would be convincing. We come now to the law as it applies to the particular charges before you for consideration and determination.

Count One of the indictment in terms reads:

"On or about March 11, 1955, within the District of Columbia, Robert P. Galloway, without justifiable and excusable cause, did assault, resist and oppose Harry Q. Barbour, a member of the Metropolitan Police Department operating in the District of Columbia, while the said Harry Q. Barbour was engaged in the performance of his official duties."

443 The Second Count alleges that on the same date the same defendant, and within the District of Columbia, did, without justifiable and excusable cause assault, resist, and oppose John P. Paul, a member of the Metropolitan Police Department operating in the District of Columbia, while the said John P. Paul was engaged in the performance of his official duties. The statute on which these two counts is based, in so far as material to your consideration, reads: "Whoever, without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates or interferes with any officer or member of a police force operating in the District of Columbia, while engaged in or on account of the performance of his official duties, shall be punished as provided by the statute."

444 The elements of this offense which you must find the Government has proved beyond a reasonable doubt in order for you to find the defendant guilty as to either of the two counts are: One, that the complaining witness was a police officer; Two, that the defendant knew he was a police officer; Three, that the complainant--the officer--was engaged in or on account of the performance of his official duties; Four, that the defendant assaulted, resisted, opposed, impeded, intimidated or interfered with the complainant--and you will note that those terms are in the disjunctive-- And, the fifth and last element: That the defendant acted without justifiable cause. As to the first and second elements, that the complainant was a police officer and the defendant knew he was an officer, there is no conflict in the evidence. As to the third element, that the complainant, the police officer, was in the discharge of his official duty, you are instructed as a matter of law that it is the duty of a police officer to investigate complaints of larceny and to arrest without a warrant for certain offenses.

There has been testimony in this case that the police received the report of the stealing of a coat. There is conflict in the testimony as to whether, when the defendant first went with the officers, they placed him under arrest without and arrest warrant or whether the defendant went voluntarily to the police precinct with the officers for questioning. You are instructed that a police officer may arrest without a warrant one believed by him upon reasonable cause to have committed a felony, but he may arrest without a warrant one guilty of a misdemeanor only if it is committed in the officer's presence.

445 Since all the evidence in this case is that the coat believed to be missing was of the value under one hundred dollars, the offense which the officers believed might have been committed was petty larceny, and petty larceny is a misdemeanor. The officers therefore had no official duty or right to arrest the defendant without a warrant for the theft of this coat.

If you should find the defendant was placed under arrest for the theft by the officer when he first went with him, then you are instructed as a matter of law you would find such arrest was illegal. A person is arrested if he is taken into custody or restrained of his liberty. There is further testimony, however, that enroute to Number 11 Precinct the defendant engaged in disorderly conduct and profanity; cursing and swearing on the public street. Under the District of Columbia Code of Laws, it is provided in part as follows: "It shall not be lawful for any person or persons to curse, swear, or make use of any profane language, or indecent or obscene words, or to engage in any disorderly conduct in any street, avenue, alley, road, highway, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, 446 alley, roadway or highway." And further: "Whoever with the intent to provoke a breach of the peace, under such circumstances that a breach of the peace may be occasioned thereby: "One: Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; * * * "Three: Shouts or makes a noise either outside or inside a building during the night time to the annoyance or disturbance of any consider-

able number of persons, shall be punished as provided by the statute." All of these offenses are misdemeanors.

So, even if you should find that the defendant Galloway was arrested illegally in the first instance, if he later, while with the officers, used profane language or engaged in other disorderly conduct on the public street, then you would find that he did commit a misdemeanor in the presence of the officers and that they then had the official duty and right to arrest the defendant without a warrant for that misdemeanor. As to the fourth element, that the defendant assaulted, resisted, and opposed the officer, you have heard the evidence. I will, however, define the term, "assault" for you. An assault is defined by law as an unlawful attempt or effort with force and violence to do injury to the person of
447 another, coupled with the present apparent possibility of carrying out such an attempt.

As to the fifth element, that the defendant acted without justifiable and excusable cause, you are instructed that no person has a right to resist an officer who acts lawfully in the discharge of his duty, but any person has the right to resist an unlawful arrest and, in so doing, he may use such force as would appear to a reasonable man in his position to be necessary to free himself from unlawful custody. If the defendant was illegally arrested and he used only such force, he would be acting with justifiable and excusable cause. If, however, although illegally arrested, he used more force than he had reasonable grounds to believe necessary to free himself the use of the excessive force would be without justifiable and excusable cause.

You are further instructed that a police officer, even though he be justified in making an arrest, is not entitled to use any greater force than he has reasonable grounds to believe necessary under the circumstances. If the officer uses excessive force, he is guilty of an assault, and the person being arrested is entitled to use force to protect himself under the same conditions as would entitle him to defend himself from
448 any other assault. But the law of self-defense is one of necessity, and in order to justify the use of force in self-defense, the following conditions

must be present: One: The person must act on an honest conviction that he is in imminent, present danger of bodily injury at the hands of his assailant or assailants, and he must have reasonable grounds for such belief. Two: He must not be the aggressor, and mere words without more are never considered provocation. Three: He must use no more force than reasonably appears necessary under all the circumstances to avert the threatened injury to himself. All three of these conditions must be present in order to entitle one to use force in self-defense.

Therefore, if you should find from the evidence that the defendant Galloway used force against the police officer, but did so after the officer exerted excessive force on him, and the defendant, believing himself in danger of bodily harm, used no more force than appeared reasonably necessary to repel the excessive force used by the police officer or officers, then the action of a defendant in using force on the officer would be justifiable and excusable on the ground of self-defense.

449 But even if you should find the officer or officers used excessive force and the defendant used force in self-defense, if you should further find that the defendant had no reasonable ground for believing himself in danger of bodily harm or that the defendant was the aggressor, or that the defendant used more force than appeared reasonably necessary under all the circumstances to protect himself, then you would find the defendant's use of force was not justifiable or excusable on the ground of self-defense.

In determining whether the force exerted either by the police officer or by the defendant was unreasonable and excessive, if you find that either did exert force you should view the facts as they would have appeared under all the circumstances at the scene and as of that time, to an ordinarily prudent and intelligent person in his position. To constitute an assault the act must be intentional.

You are instructed that even if you find the defendant struck the officer while he was making the arrest, yet if you further find the striking was accidental or unintentionally inflicted by the defendant, you should find the defendant not guilty.

As to each count the Government has the burden of proving beyond a reasonable doubt each and every one of the elements of the offense charged, including the fact that the defendant acted without justification. If you find the Government has failed to prove any one or more of these elements as to either or both of the counts set forth in the indictment, then you must find the defendant not guilty. On the other hand, if you find the Government has proved all of the elements beyond a reasonable doubt, then you may find the defendant guilty as to such count or counts. Have counsel anything to add?

MR. HARRIS: Yes, your Honor.

(Bench Conference:)

MR. HARRIS: I know that your Honor gave the substance of my Prayer Number 2, but I wonder if the jury could be instructed on this situation: Assuming that the jury found that the arrest was illegal in the first instance, and that the offense of disorderly conduct was not shown or did not exist, then under that circumstance--it is in one of these prayers--then the jury had only to consider the question of reasonable or excessive force.

THE COURT: I think I have covered that. I think I have specifically said that. Because I have enumerated the specific elements which they are required to show.

MR. HARRIS: I don't know what number it is, but I know I have a prayer here including it, that where two hypotheses appear, one leading to the guilt of the defendant and the other leading to the innocence of the defendant, the jury is bound to accept the hypothesis leading to the innocence of the defendant even though it would be the more probable of the two. Now, that, of course, is a little bit different from saying that if you can reconcile the evidence--I think your Honor gave one "If you can reconcile the evidence on any reasonable hypothesis to acquit the defendant, then you should do so".

Well, I think the prayer I have just referred to is a little bit different from that, and I don't know--I think your Honor usually gives it--but I didn't hear it this time.

THE COURT: I gave my usual one. At least I think I did, Mr. Harris.

MR. HARRIS: Well, your Honor read those two statutes, the profane language one and the disorderly conduct one, and did not tell them which was which; which was the disorderly conduct statute and which was the indecent language statute.

THE COURT: I read them the act as it appears on the statute book. I think they are both disorderly. As a matter of fact, the first one which I read says so in its body.

MR. HARRIS: Then there is one denominated as disorderly
452 conduct.

THE COURT: I don't think the title or denomination means anything.

MR. HARRIS: Now, your Honor said that the jury should consider the fact that the defendant testified--should consider the defendant's situation, I believe, and whatnot.

THE COURT: Yes; as any other witness.

MR. HARRIS: Well, I say, your Honor, that I object to that and I say that there should have been--I believe that the proper instruction would have been that the jury should consider the interest that any witness might have, and not just point up the defendant's.

THE COURT: I did both. I did both, sir.

MR. HARRIS: When your Honor said that, it seemed to point up the defendant's side.

THE COURT: No. I gave the others first. I covered all the witnesses.

MR. HARRIS: And for the record, before I go any further, I wanted to object to the denial of such of my prayers as have been denied. I think I am required to do that.

THE COURT: My recollection is, Mr. Harris, that I only denied one, didn't I?

MR. HARRIS: Yes, your Honor.

453 THE COURT: That was 6-A, because that would have amounted to a directed verdict, wouldn't it? 6-A. Isn't that the one we denied?

MR. HARRIS: Yes; your Honor denied that one.

THE COURT: Is there any other one we did deny? You withdrew some.

MR. HARRIS: Yes, sir, I withdrew 10. I remember number 10.

THE COURT: And you withdrew the original 9.

MR. HARRIS: And substituted.

MR. CAPUTY: Your Honor did instruct on probable cause to arrest in a felony?

THE COURT: Yes.

MR. CAPUTY: And your Honor stated that arrest for a misdemeanor committed in the presence--

THE COURT: That is right.

MR. CAPUTY: But could we have probable cause in the petty larceny?

THE COURT: I think it is a different situation. The only misdemeanor that we had in this case that he could have arrested him for was one committed in his presence, and it is going to be for the jury to determine whether he did in fact commit this, namely, being loud and boisterous and cursing and swearing.

454 MR. HARRIS: I got the impression from your Honor's instruction that your Honor instructed them that if the arrest was defective upon the initial approach then the arrest was unlawful.

THE COURT: That is right; and then I came down, -- "Unless they find in fact that he was guilty of disorderly conduct". I think that was the question of fact. Is that all?

MR. CAPUTY: Yes.

MR. HARRIS: I got the impression, as I said, that you did mention something about a felony. I was wondering if your Honor might clear that up a little bit?

THE COURT: I think I would pollute it if I did. From your point of view I definitely said there was no felony here.

MR. HARRIS: All right; I will withdraw that last thing I said, then.

THE COURT: All right.

(Open Court:)

THE COURT: There being nothing further from either counsel, the Court will state to you that your verdict in this case will be guilty or not guilty as to Count 1; guilty or not guilty as to Count 2. The law requires
455 that your verdict as to each one be unanimous.

This matter is of course important to all concerned and when you go to the jury room you will consider this case deliberately and carefully, dispassionately and objectively, without bias or prejudice for or against the defendant, without emotion, and without sympathy, and in the light of the instructions on the law which I have given you, bearing in mind that you are the sole judges of the facts and that you are obligated to follow my instructions only as to the law.

There being nothing further from either counsel, Madam Juror Alternate and Alternate Juror, you are excused with the thanks of the Government Counsel, Defense Counsel and the Court, the contingency for which both of you were selected not having occurred.

As to the remaining twelve jurors, it now becomes your duty to retire to the jury room, select your foreman and consider and decide the case. You may now retire and so do.

(Whereupon, at 3:55 o'clock, p. m., the jury retired to deliberate of their verdict.)

(Whereupon, at 6:00 o'clock p. m., the jury returned to the Courtroom.)

THE COURT: Ladies and gentlemen, I do not want to know how
456 you stand. Please don't anyone say anything. I assume from the fact there has been no verdict, that you have reached no verdict as to either of the two counts as yet. Is that correct?

THE FOREMAN: That is correct.

THE COURT: Is there any prospect of your reaching a conclusion in a short period of time, sir?

THE FOREMAN: No, your Honor.

THE COURT: All right, then. We are going to excuse you to go with the Marshal for dinner, and he will take you to dinner and then bring

you back.

* * * * *

457 THE COURT: It is now almost 10:40 and I am going to excuse you,
to return tomorrow morning at 9:45 to the jury room in the back of this
Court,

* * * * *

458 (Whereupon, at 10:38 p. m., the jury was excused, to
return October 12, 1955, at 9:45 a. m.)

459 * * * * *

Wednesday, October 12, 1955.

460 * * * * *

(Bench Conference:)

THE COURT: I sent for you gentlemen because I received a note
that says "After deliberation a unanimous decision cannot be reached."
They have been out now--or as of that time, -- about forty-five minutes.
So I propose to give them the Allen Charge. Does anybody have anything
to say?

MR. CAPUTY: No objection.

THE COURT: All right, sir. We will do that and see what happens.

(Open Court:)

(Whereupon, at 11:00 o'clock a. m., the jury was brought
into the court room and resumed their seats in the jury box, at which
time the following proceedings were had:)

THE COURT: Now, ladies and gentlemen of the jury, I do not want
to know how you stand. I have advised counsel that I received your note
saying that as yet you have not been able to reach a unanimous decision
in this case.

461 I take that to mean that you have not reached a verdict as to either
of the two counts.

That being so, it now becomes the duty of the Court to give you
further instruction in this matter. In doing so, you will understand that
the instruction heretofore given you is still in full force and effect. In
other words, what is now to be given to you will be supplemental thereto.

You are instructed that in a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellows, yet you should examine the question submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide the case if you can conscientiously do so.

You should listen with a disposition to be convinced to each other's arguments. If much the larger number are for conviction, a dissenting juror or jurors should consider whether his or her doubt is a reasonable one, which makes no impression upon the minds of so many jurors equally honest, equally intelligent with him or herself. If on the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.

462 Counsel for the government and counsel for the defendant have both frankly stated that they have presented all the evidence which they deem material to their respective cases; hence, you are now vested, in the opinion of the counsel and the court, with all the facts pertinent to the case.

It seems to the court that little can be gained by a retrial of this cause, and that you are as well informed as any subsequent jury could be. It is therefore desirable that you agree upon a verdict if that can be done consistently with your conscientious conviction. Now, with that supplemental instruction you may now retire to further consider the case.

(Whereupon, at 11:06 a. m., the jury retired to deliberate further of their verdict.)

(Whereupon, at 12:25 p. m., the following proceedings were had:)

THE COURT: Come to the bench.

(Bench Conference:)

THE COURT: Mr. Harris, Mr. Stevas is here and says he will stand in for Mr. Caputy because they haven't located him yet. I have called you gentlemen because I received this note from the jury that says,

"After deliberation of more than six hours on this case, we, the jurors,
463 find it impossible to reach a unanimous decision."

MR. HARRIS: I guess that's it.

THE COURT: They have only been Allenized since 11:10 or something like that, and that has been an hour.

MR. HARRIS: 11:10?

THE COURT: Something like that.

MR. HARRIS: This is the third note they have sent saying they can't agree so it seems to me that is about all we can do.

MR. STEVAS: Do you think they could do better on a full stomach?

MR. HARRIS: Well, they had breakfast and they had dinner last night and came back after dinner and deliberated and they came fresh from home this morning, and this is--

THE COURT: They haven't had much time--they have had about an hour since the Allen Charge. I think I will send them to lunch and see what transpires, and then come back and further deliberate.

MR. HARRIS: Your Honor, at this time I would like to state it is my desire that they be discharged.

THE COURT: Certainly.

(Open Court:)

THE COURT: Mr. Marshal, tell the jury they will be sent to lunch,
464 for further deliberation after lunch.

(Whereupon, at 2:50 o'clock p. m., the jury returned with their verdict as follows:)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, sir.

MR. CLERK: What say you as to the Defendant Robert P. Galloway on Count 1 of the indictment?

THE FOREMAN: Not guilty.

THE CLERK: Count 2.

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your foreman says that you find the defendant Robert P. Galloway not guilty on Count 1 and guilty on

Count 2, and that is your verdict, so say you each and all?

(Affirmative nods.)

MR. HARRIS: May the jury be polled, your Honor?

THE COURT: Yes, sir.

* * * * *

(The jury was polled.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,010

ROBERT P. GALLOWAY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

OLIVER GASCH,

United States Attorney.

LEWIS CARROLL,

VICTOR CAPUTY,

JOHN D. LANE,

Assistant United States Attorneys.

STATEMENT OF QUESTIONS PRESENTED

Officer Hilton, an acquaintance of appellant's family (who lived and operated a place of business very close to Number 11 Precinct), received a complaint from the manager of a restaurant in this area that her coat had been stolen. She placed appellant and some other young men in the cafe at the time, business otherwise being slack. The officer noted the complaint at the precinct and shortly after, while walking his beat, encountered the appellant. The officer asked him to come to the precinct to talk to the precinct detective. He did not order him to come and appellant went voluntarily, stating that he had not taken the coat and was willing to discuss the matter. He lit a cigarette and accompanied the officer. As they were approaching the precinct appellant cursed the police, using obscene and profane epithets. Warned he would be arrested for disorderly conduct, appellant persisted and the officer took hold of him placing him under arrest. Inside he kicked two officers in the groin, causing serious injuries. The charge was cohesive, balanced and couched in the court's language. One requested instruction (number 6-A) was denied and objection to the charge was waived below except to the outright denial of this one request. In the opinion of the appellee the questions are:

(1) Was it proper to deny a requested instruction (number 6-A) that appellant as a matter of law did not commit the offense of disorderly conduct?

(2) Is review of claimed misleading statements in the charge foreclosed because objection was waived below, the charge being based in substantial part on appellant's requested instructions granted in substance?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,010

ROBERT P. GALLOWAY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

COUNTERSTATEMENT OF THE CASE

A two-count indictment (J. A. 1) was returned against appellant charging that on March 11, 1955, he assaulted two officers of the Metropolitan Police while they were engaged in the performance of their official duties (22 D.C. Code § 505 (Supp. 1954)). Found guilty by a jury on the second count of assaulting Officer John B. Paul, appellant was committed to the custody of the Attorney General under the Federal Youth Corrections Act (18 U.S.C. § 5010(b) (1952)). This is an appeal from that judgment (J. A. 8).

A. *The Commission of the Crime*

On the evening of Friday, March 11, 1955, Private Glen A. Hilton, of the Metropolitan Police, was on duty as a patrolman (R. 14). His beat included Thelma's Restaurant, located at 2410 Nichols Avenue, S. E. (R. 14). Also included was a liquor store in the next block operated by appellant's mother (R. 239.) This latter establishment is about a block from Number 11 Precinct (R. 290, 291). Ap-

pellant's home is two blocks from the station house (R. 239). Private Hilton knew appellant and his family socially (R. 26).

On March eleventh Mrs. Minnie I. Harley was in charge of Thelma's Restaurant, which is owned by her sister, Mrs. Thelma Beasley (R. 221). It was a "slow night" with few customers and for that reason she was on by herself (R. 226). About ten or fifteen minutes after nine P. M. Officer Hilton entered the restaurant. Mrs. Harley came over to him and told him that her coat was missing (R. 16, 54). Officer Hilton then went to Number 11 Precinct where he put a larceny report "on the complaint book" (R. 16, 17). He returned about ten minutes later (R. 36, 37). According to the officer, at that time Mrs. Harley told him that the coat was in the restaurant at the time the appellant and some companions entered the restaurant and that when they left she noticed the coat was missing (R. 28, 29). The only name she knew was that of the appellant, Robert P. Galloway, who was then in a beer garden nearby, but she could identify another of the group whom she said was in a poolroom across the street (R. 222-224, 232).

Mrs. Harley accompanied Officer Hilton to the poolroom where she pointed out one Ralph Roy (R. 17, 32, 33, 224). Officer Hilton testified that, in the presence of Mrs. Harley, he recounted her complaint, whereupon Ralph Roy denied having taken the coat¹ (R. 33). Officer Hilton asked Roy if he would go to the station for questioning by the precinct detective on duty; Roy agreed and went voluntarily. Officer Hilton testified he did not place Roy under arrest and did not book him (R. 29, 32, 33, 37).

It was about nine-thirty P. M. when Officer Hilton and Roy arrived at the station (R. 36, 37). Officer Harry Q. Barbour, the precinct detective on duty, was in the detective room at the head of the stairs on the second floor of the station (R. 153, 154). Officer Hilton took Roy to Officer

¹ The following day the complainant, Mrs. Harley, informed Officer Hilton that the coat had been borrowed by her from her sister, Mrs. Thelma Beasley, and that the latter, unknown to her, had taken the coat (R. 26, 27).

Barbour, explained the circumstances to the latter, and then returned to the 2400 block of Nichols Avenue S. E. (R. 17, 18).

It was there that Officer Hilton saw appellant for the first time that evening (R. 18). It was then about nine thirty-five or forty P. M. (R. 51). Appellant was driving an automobile and was accompanied by Randolph Chase, employed in appellant's mother's liquor store (R. 18, 239). Officer Hilton walked over to the automobile and told appellant he would like to speak to him. The latter asked the officer to get in the car while he pulled around the corner and parked (R. 18). Officer Hilton and appellant got out, leaving Chase in the auto (R. 18, 41). Appellant asked the officer what was the matter and received the reply "Galloway, we got a report of a stolen coat and the lady said you were in the restaurant at the time it was missing" (R. 18). Appellant denied taking the coat (R. 18).

Officer Hilton testified that he did not order appellant to come to the station but requested him to do so and that appellant told him he "didn't mind going up and talking at the precinct" (R. 30). Appellant lit a cigarette and walked toward the precinct with the officer. When they were almost there, Officer Hilton said, appellant began to create a scene, cursing the police and telling the officer he was "tired of these so-and so's picking me up every time" (R. 19). The officer warned him if he did not cease he would arrest him for disorderly conduct. Appellant replied "Well, forget it. My mother will get me out" (R. 19). At this time Officer Hilton grabbed appellant by the belt and told him he was under arrest for disorderly conduct and took him into the precinct (R. 20).

At the time Detective Sergeant Andrew J. Gerber was typing reports in the detectives' office on the second floor and Officer Harry Q. Barbour, the precinct detective on duty, was seated opposite him (R. 104, 154, 155). Ralph Roy, having been questioned, was seated in the main room on the first floor (R. 43). The other officers then in the precinct were in this room: Officer John B. Paul, at the switchboard, Huntington F. Smith, Jr., operating the patrol sig-

nal system, and John R. O'Bryen, station clerk (R. 124, 137, 81). The latter two officers noticed Officer Hilton bring appellant in the side door at which time appellant was loudly "cursing and swearing" (R. 138, 83). He was heard to say as he entered "these white such-and-such people 'killed my father but they are not going to kill me' " (R. 138).

Although Officer Hilton had placed appellant under arrest before going upstairs, he did not immediately book him for disorderly conduct as he was "raising . . . cain" and there were two ladies standing at the charging desk (R. 45). Officer Hilton proceeded with appellant up the stairs to the detectives' office (R. 20). As they "got to the door Galloway was still loud and boisterous". Officer Hilton told him to be seated in a chair by the window and appellant complied (R. 20).

Officer Hilton stood at the door of the office and explained to Officer Barbour that appellant was one of the persons "involved in a missing coat which was reported at Thelma's Restaurant." At this time the officer told Detective Barbour "When you finish with him, book him for disorderly conduct to me" (R. 20).

Detective Barbour, not being able to hear Officer Hilton, called to appellant from the door and Officer Gerber also told him to be quiet so that Officer Barbour might hear (R. 106). Officer Barbour testified that as appellant continued to use "very loud, profane language" he told Officer Hilton "Take him downstairs" (R. 156). The officer continued:

" . . . Galloway jumped out of the chair and he struck me in the mouth, knocked me backwards towards the wall . . . and then he came at me and grabbed me and tore my shirt down the front, and Private Hilton finally got a-hold of him from the back and he and Hilton went out the door backwards. Hilton was pulling him backwards. So I regained myself there and I went out and he was kicking and thrashing about pretty badly, and I . . . went towards him to help Private Hilton. And when I got within range of Galloway, he

kicked me in the groin. When I . . . doubled up and went down, why, I got kicked in the eye, the right eye." (R. 156).

When Officer Barbour arose, Officer Hilton had succeeded in getting appellant down to the second landing on the stairway. As Officer Barbour got to the bottom of the stairs, seeing Private Paul falling down from appellant's kick, the detective went "to help Hilton again" and received a "second kick" (R. 157).

In the detective office Sergeant Gerber had stepped over Officer Barbour's body and grabbed appellant's left leg, twisting it until Officer Hilton told him he had a good hold on him from the rear. Sergeant Gerber went over to the steps and observed Officer Hilton going "down the steps backward with Galloway in his arms" (R. 108).

After appellant had swung at Officer Barbour, Officer Hilton pushed him over to the wall of the detectives' office and "told him to calm himself". Appellant "started up again" and Officer Hilton "grabbed him by the neck and pulled him out into the hallway" (R. 21, 62-63). Officer Hilton stated:

" . . . as we got into the hall, and as I turned to take him down the hall to the steps, Officer Barbour came out the door and he kicked Officer Barbour in the groin . . . Officer Barbour fell, and I saw him kick at him again" (R. 21, 22).

Telling Sergeant Gerber he had appellant under control, Officer Hilton proceeded down the steps with appellant (R. 21, 22).

Officer Paul testified that about nine-fifty P. M. he heard scuffling coming from the second floor and observed Officer Hilton coming down the steps backward (R. 126). He had "an arm-hold on Galloway, and Galloway was fighting to attempt to get away". As Randolph Chase went over to where they were, Officer Paul came from behind the railing (R. 126, 127). Officer Paul stated:

"I proceeded to get Chase back from where Officer Hilton and Galloway were . . . And I pulled him back, and Galloway started kicking, and I received one kick in the groin. . . As I fell forward I got kicked in the stomach and I fell back to the floor. . . So I went unconscious" (R. 127).

Officer Hilton testified that at the time Randolph Chase, appellant's friend, came up he had appellant up beside the wall. The officer continued:

"I said, 'Galloway, calm yourself.' He said 'Officer Hilton, I am tired of these people messing with me.' At that time Chase came up and told him to calm himself. And he told Chase the same thing he told me—"I am tired of these so-and-so's. They killed my father; they are not going to kill me."

"At that time Officer Paul got up from behind the railing and that is when Galloway started again; and I grabbed hold of him again,² and as Officer Paul stepped off the low platform on to the floor in the precinct, he kicked Officer Paul right in the groin. . . Officer Paul was knocked out" (R. 23, 24).

Officer Hilton then stated that with the help of Officer Smith and Detective Barbour he put appellant in a cell (R. 24). Officer Hilton then followed Officer Barbour to the lavatory, where the latter officer, in pain, vomited into the bowl (R. 24-25). Enroute Officer Hilton picked up the plainclothesman's pistol on the floor outside the cell and returned it to Detective Barbour (R. 376).

Officer Barbour spent the night at Emergency Hospital

² Appellant admitted on the stand that Chase had told him to calm down (R. 329). Chase testified on direct examination that appellant was kicking before Officer Paul got to him (R. 244). He denied telling a special agent of the Federal Bureau of Investigation that Officer Hilton released his grip after appellant subsided (R. 252, 253). Five days after appellant's arrest, according to Special Agent Robert C. Nagel, Chase told him that before the assault on Officer Paul appellant seemed to calm down, that Officer Hilton released his grip, and then had to reapply it when appellant resumed struggling (R. 416, 422, 424).

where they packed his groin with ice (R. 159). His injuries required him to be off duty about a week (R. 159). Officer Paul was taken there in an ambulance and not released for three days. He was off duty sixteen days (R. 128, 129).

Appellant, taking the stand in his own defense, denied using any profanity (R. 293). He claimed that in the detectives' office Officer Barbour struck him first and he defended himself (R. 297). He claimed to have been struck then by other officers, but that this ceased when he got to the bottom of the stairs (R. 297, 318).

It was appellant's claim that all the officers in the detectives' office had struck him except Officer Hilton (R. 300). Officer Hilton, however, testified that all times he had the office in full view (R. 61). Officers Hilton, Gerber and Barbour³ all testified that no one struck appellant at any time (R. 25-26, 158, 109). As Detective Barbour put it, he could not get close enough because appellant "was nothing but feet" (R. 158).

In view of the short space of time involved,⁴ and the nature of the serious injuries dealt the police, it is significant that appellant was practically unmarked.⁵ Thus not only

³ These officers all testified that the patrolman and two detectives were the only persons in the upstairs office (R. 20, 105, 154). Appellant put another officer, Precinct Detective T. P. Denton, in the room (R. 296). Officer Denton testified that he was off duty that day and did not arrive at the precinct until after 11 P.M. and that he never saw Galloway (R. 372, 373).

⁴ From appellant's arrival at the precinct to his being placed in the cell less than twenty minutes had elapsed (R. 55).

⁵ Appellant's physician, Dr. Kenneth G. Brown, testified that he examined appellant on March twelfth (R. 275, 277). He found a laceration on the inside of appellant's lower lip (R. 278). He stated there was "a severe bruise to the jaw over the right cheekbone" but no fracture (R. 278, 279). Five days after the examination, and seven months before his testimony, the doctor had told a special agent of the Federal Bureau of Investigation, Robert C. Nagel, "that he could not recall seeing any contusions or bruises" except "a mark approximately one by one and a half inches above one eye, with a scratch through it" (R. 429). (Two years before the examination the doctor had placed a pin in appellant's left hip; the examination revealed "no disturbance of the alignment of the hip") (R. 278)).

the direct testimony but the circumstances of the assault indicated little opportunity for the officers to have exerted any more force than was necessary to maintain the arrest.

B. *The Charge to the Jury*

The charge was delivered in the trial court's language (J. A. 107-114, 117). The evening before its rendition appellant submitted numerous written requests for instructions, the court thereupon inviting counsel to attend a meeting the next morning, before trial resumed, to discuss them (R. 345, 354). The conference was not transcribed, but its substance was indicated in the record, after the general charge, when the court called counsel to the bench to permit them to point out any errors or omissions (J. A. 114-117).

After some general discussion, defense counsel stated ". . . I wanted to object to the denial of such of my prayers as have been denied. I think I am required to do that." The court's recollection was that only one requested instruction had been denied and to this appellant's counsel agreed⁶ (J. A. 115, 116). After conceding that only one requested instruction had been denied, appellant's counsel suggested an addition to the charge which he withdrew after discussion (J. A. 116). Thereupon the court, noting that there was "nothing further from either counsel", completed its general charge (J. A. 117).

The jury were first precisely instructed as to the general principles of law governing the case.⁷ The court, after

⁶ This requested instruction, number 6-A (J.A. 5), asked that the jury be informed that "as a matter of law defendant Galloway did not commit the offense of disorderly conduct in the presence of officer Hilton"; it was denied because it "would have amounted to a directed verdict" (J.A. 115, 116). Appellant's contentions as to this denial (Br. 26) are considered in Argument II, *infra*.

⁷ The jury's function as sole judge of the facts was defined, and that of court and counsel clearly described (J.A. 107). Precise instructions were had as to presumption of innocence, burden of proof and the quantum of evidence required to convict (J.A. 107, 108). They were told that proof beyond a reasonable doubt must be had as to each element of the crime. If they could they should

reading the indictment and the applicable statute, then set forth the elements of the offense each of which had to be proven beyond a reasonable doubt. (J. A. 110, 108).

The court instructed that it was "the duty of a police officer to investigate complaints of larceny and to arrest without warrant for certain offenses" (J. A. 110). The court stated there was "conflict in the testimony as to whether, when the defendant first went with the officer, they placed him under arrest without an arrest warrant or whether the defendant went voluntarily to the police precinct with the officers for questioning" (J. A. 111). The court instructed that if "you should find the defendant was placed under arrest for the theft by the officer when he first went with him, then you are instructed as a matter of law you would find such arrest was illegal." It was explained that petit larceny was a misdemeanor, a class of crime justifying arrest without warrant only where committed in an officer's presence (J. A. 111).

The court pointed out that "There is further testimony, however, that enroute to Number 11 Precinct the defendant engaged in disorderly conduct and profanity; cursing and swearing on the public street" (J. A. 111). It read the Code provisions applicable to the evidence of disorderly conduct ⁸

reconcile the evidence with any reasonable hypothesis consistent with innocence (J.A. 108). The court suggested the general considerations governing the determination of credibility. It further pointed out that the evidence of good character might be sufficient alone to create a reasonable doubt (J.A. 109).

⁸ 27 STAT. 323, § 6 (1892), as amended, 22 D.C. CODE § 1007 (Supp. 1955): "... it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed . . ."

See also 67 STAT. 98, § 211 (1953), 22 D.C. CODE § 1121 (Supp. 1955).

and indicated that the offense was a misdemeanor (J. A. 111, 112). The court instructed that even if it were found that appellant "was arrested illegally in the first instance, if he later, while with the officers, used profane language or engaged in other disorderly conduct on the public street, then you would find that he did commit a misdemeanor in the presence of the officers and that they then had the official duty and right to arrest the defendant without a warrant for that misdemeanor" (J. A. 112).

The court defined assault and instructed that a "person has the right to resist an unlawful arrest and, in so doing, he may use such force as would appear to a reasonable man in his position to be necessary to free himself from unlawful custody" (J. A. 112).

The jury were informed that use of excessive force by a police officer would constitute assault (J. A. 112). Instruction was had on self-defense (J. A. 112, 113). The court stated that physical aggression by the police might be resisted. Accidental or unintentional blows by appellant would not suffice for conviction (J. A. 113).

In concluding the court reiterated that "As to each count the Government has the burden of proving beyond a reasonable doubt each and every one of the elements of the offense charged, including the fact that the defendant acted without justification" (J. A. 114).

The charge, as heretofore noted, was delivered in the language of the court and based in substantial part on requests granted in substance to appellant, only one such instruction being denied.

STATUTE INVOLVED

REV. STAT. D.C. § 432 (1875), as amended, 22 D.C. CODE § 505 (Supp. 1954):

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties,

shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than ten years.

SUMMARY OF ARGUMENT

I

Appellant makes three arguments, all asserting claimed imperfections in the charge. Below appellant waived objection to the charge except to the outright denial of one requested instruction (number 6-A), covered in Argument II.

Appellant's ninth requested instruction, on which his first argument is based, was granted in substance and so delivered. Appellant inaccurately claims to have preserved this objection below as the record discloses failure to comply with Federal Criminal Rule 30.

II

The only objection to the charge not waived was one made below to the denial of a requested instruction which would have required the jury to be told that appellant did not as a matter of law commit the offense of disorderly conduct. The denial was proper as there was evidence he committed this offense in the presence of the arresting officer.

III

Appellant concedes he waived objection below to claimed misleading statements in the charge. These are reiterations of particular criticisms mentioned above. The court gave a cohesive, balanced charge, couched in the court's language, to which no contemporaneous objection was taken. As the charge was based in major part on appellant's requested instructions granted in substance, no substantial right is involved.

ARGUMENT

I

Appellant's Requested Instructions Were Incorporated in Substance in the Charge

(a)

As Appellant Did Not Object to the Charge, Review of Claimed Errors Is Foreclosed

Appellant makes three arguments, all asserting imperfections in the charge (Br. 11, 22, 29). They may be classified as follows: (1) claimed inadequate coverage of instructions granted in substance (*e. g.*, Br. 16); (2) asserted denial of requested instructions (*e. g.*, Br. 26); (3) allegedly misleading statements, not objected to, claimed to affect substantial rights (*e. g.*, Br. 35).

In that portion of the counterstatement summarizing the charge, it was shown that the charge was cohesive, couched in the court's language, and based in substantial part on appellant's requested instructions granted in substance. The written requests, submitted the night before, had been discussed before the jury returned to the box on the last day of trial. After the rendition of the charge the court, in accordance with Federal Criminal Rule 30, called counsel to the bench for the purpose of pointing out any errors or omissions. At that time appellant, recapitulating the prior discussion of his requested instructions, made plain that his objection was to the denial of one particular instruction.⁹ He also made perfectly clear that he meant an outright denial in the instance mentioned, not an objection to the form of words in which the court had delivered instructions granted in substance.

Except in the one instance in which a requested instruction was denied outright (note 6), appellant has not pre-

⁹ This was appellant's requested instruction number 6-A (J.A. 5), asking that the jury be informed that "as a matter of law defendant Galloway did not commit the offense of disorderly conduct" which was denied because it "would have amounted to a directed verdict" (J.A. 115, 116). Appellant's contentions as to this denial (Br. 26) are considered in Argument II, *infra*.

served these points and review is foreclosed¹⁰ by failure to comply with Federal Criminal Rule 30, which requires that in "assigning error as to any part of a charge, or *for any omission therefrom*, as for failure to instruct in accordance with a request, it is essential that a distinct objection be stated with the ground upon which it is based." *Villoroman v. United States*, 87 U.S. App. D.C. 240, 241, 184 F.2d 261 (D.C. Cir. 1950) (emphasis by Court).

Appellant's first argument is that he proffered a requested instruction (Number 9, J.A. 6) which the court did not give in substance though it promised so to do (Br. 15, 16).

Compliance with Federal Criminal Rule 30, assumed by the appellant, must be sought in the record. Appellant states in his brief (p. 16) that he "objected to the denial at the conclusion of the Court's charge." For authority he refers to a page of the Joint Appendix which merely sets forth the general objection he had made to preserve consideration of all written requests for instructions which had been denied (J.A. 115). As detailed above, this blanket objection reduced itself, appellant agreed at the trial, to but one specific denial of a request, not involved here (note 9, *supra*).

It is therefore concluded that before the jury retired appellant made no objection to the court's paraphrasing any requested instruction granted in substance, and his sole objection was to the outright denial of an instruction not concerned in his first argument. Not only was appellant not entitled to any form of words,¹¹ but those used were not contemporaneously objected to, in violation of Criminal Rule 30. As compliance with Rule 30 is essential "in fairness to

¹⁰ It is only as to allegedly misleading portions of the charge, covered in appellant's third argument (Br. 35), (discussed in Argument III, *supra*), that appellant claims his substantial rights were involved; as to these he asks review, absent objection below, in the exercise of the Court's discretion under Federal Criminal Rule 52(b).

¹¹ *Wheeler v. United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (D.C. Cir. 1947), *cert. denied*, 338 U.S. 829 (1948).

the court, the parties, and the administration of justice itself", appellant may not urge a mere afterthought on the attention of the Court. *Villaroman v. United States*, *supra* at 241.

(b)

Appellant's Ninth Requested Instruction Was Charged in Substance

It will be recalled that Officer Paul was severely injured¹² by a kick when he left the switchboard in the public room of the precinct to aid Officer Hilton place appellant in a cell.

Appellant argues that he was illegally arrested for petit larceny when first approached by Officer Hilton. That he was not arrested until he became disorderly when they neared the precinct, appellant concludes was "not supported by the facts or by the law" (Br. 12). Sole reliance (Br. 13) is placed upon the following quotation:

"The following are arrests:— . . . detaining to search before an arrest is contemplated . . . following or accompanying one commanded to go or come to some designated place, *against his will* . . . commanding one to . . . 'come over and see the captain', or 'you are wanted over at the station-house', which command is obeyed . . . "

1 Alexander, Arrest 358, 359 (1949) (emphasis supplied).

Appellant ignores that there is required "an actual detention against the will". *Id.* at 359. Further, the following are not arrests: "merely 'telling one to "come along" without some evident intent to compel it, and although there may be some fear of the consequences of a refusal'; merely 'accompanying an officer who has not announced his intention to arrest, and whose actions do not indicate it' ". *Id.* at 360.

¹² It is "clear" that shod feet are "dangerous weapons . . . at least when they inflict serious injuries". *Medlin v. United States*, 93 U.S. App. D.C. 64, 65, 207 F.2d 33 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 905 (1954).

As to these matters " . . . words used are relevant to indicate whether there was an arrest, or a declaration one way or the other." *Id.* at 358. "It is a question of fact for the trier of the facts what was said and done, and a question of law for the court whether it constituted a legal arrest." *Id.* at 358.

It will be recalled from the counterstatement that Officer Hilton testified that when he first met appellant he told him of the larceny complaint and that the complainant placed him in the restaurant at the time the coat was missing. He further testified that he did not order appellant to the station but requested him to go there for an interview with the precinct detective. Appellant replied that he had not taken the coat and did not mind answering questions. The officer testified that appellant lit a cigarette and voluntarily accompanied him.

Under the principles enumerated above the court was clearly correct in submitting the fact of the initial encounter to the jury as involving a "conflict in the testimony as to whether, when the defendant first went with the officers, they placed him under arrest . . . or whether the defendant went voluntarily to the police precinct with the officers for questioning" (J.A. 111). The jury were instructed that if they found appellant had been arrested in the first instance, it would be an illegal arrest as the petit larceny had not been committed in the officer's presence (J.A. 111). To neither of these instructions was there objection.

The court further instructed that a person "has the right to resist an unlawful arrest and, in so doing, he may use such force as would appear to a reasonable man in his position to be necessary to free himself from unlawful custody" (J.A. 112). This instruction may well have been more than appellant deserved, for it is not a defense "theory" (Br. 14) which warrants such an instruction, but whether there was evidence of resistance to an unlawful arrest.

Appellant never claimed on the stand that his kicking was due to a desire to free himself from an unlawful arrest for petit larceny by Officer Hilton. In *Dugan v. State*, 54

Ariz. 247, 94 P. 2d 873 (1939) a conviction of assault on a deputy sheriff, who concededly had illegally arrested the appellant for disorderly conduct not committed in his presence, was affirmed. The appellant had become disorderly in the custom house and the customs inspector telephoned a deputy sheriff. By the time the latter arrived the appellant had subsided. The deputy announced to the appellant that he was placing him under arrest and handcuffed him. Enroute to the county jail the appellant beat the officer severely with the handcuffs which had been loosened at his request. The court stated a person "may not, although illegally arrested, assault and maltreat an officer wantonly and maliciously, when the assault is not made solely for the purpose of effecting his release from the arrest". *Id.* at 874.

That there must be evidence to justify an instruction that an assault was for the purpose of effecting release from an unlawful arrest applies more strongly here, where there was evidence that no arrest was made until appellant became disorderly in the presence of the arresting officer and the assault was actually made on others as to whom appellant had expressed his malice.

Appellant asserts that one of his principal "theories" of defense (the other being self-defense based on his testimony that Officer Barbour struck him) was "resistance to the unlawful arrest", the two assaults being "part and parcel of a single and continuous effort . . . to free himself from the unlawful custody" (Br. 14, 15). Therefore, appellant claims, it became important for him to associate the kicking of Officer Paul with an allegedly continuous resistance to an arrest by Officer Hilton illegal in the beginning (Br. 15).

From these premises it is concluded that the court erred in not using the language of his requested instruction number 9 (J.A. 6) which the court granted in substance. The request, however, merely deals with appellant's right to defend himself against Officer Barbour. Officers Paul and Hilton are not mentioned by name. More importantly, no theory of resistance from the beginning is mentioned. The jury were instructed as to appellant's claim that Officer

Barbour was the aggressor and self-defense was adequately covered (J.A. 112-113).

It is therefore concluded not only that appellant's claim to have preserved the point is inaccurate but that no substantial right is involved.

II

The Court Properly Refused to Instruct That Appellant Did Not Engage in Disorderly Conduct

As detailed above, Officer Hilton testified that after voluntarily accompanying him almost to the precinct for questioning as to a petit larceny, appellant became disorderly and was put under arrest for this misdemeanor committed in the officer's presence.

Appellant covers two propositions in his second argument (Br. 22). The first is that the court should have instructed the jury as a matter of law that appellant was placed under arrest when he first encountered Officer Hilton and that such arrest was illegal. In appellee's first argument the answer was elaborated that the court correctly instructed that the fact of an arrest when they first met was for the jury to determine on the evidence, and if they found there had been an arrest they were charged that it would be illegal.

The second proposition advanced is that there was no evidence of disorderly conduct (Br. 24, 26) and that therefore the court erroneously denied appellant's requested instruction number 6-A (J. A. 5) "that as a matter of law defendant Galloway did not commit the offense of disorderly conduct in the presence of Officer Hilton".

Officer Hilton had testified that just before arriving at the precinct "Galloway stated that he was tired of the policemen picking him up every time something went wrong over there". The officer told him he should not have that attitude. Appellant stated that his father had been killed and that they were not going to do it to him. He said "I am tired of these so-and-so's picking me up every time". The officer then told the appellant if he did not quiet down he would be arrested for disorderly conduct. Met with a defiant answer that his mother would get him out, the officer arrested appellant (J. A. 11).

At the time appellant was "loud and boisterous" (J. A. 20), the officers on duty in the public room of the station observing that as he entered appellant was loudly "cursing and swearing" (J. A. 45, 31). He was heard to say as he entered "these white such-and-such people 'killed my father but they are not going to kill me' " (J. A. 45). Officer Hilton testified that he did not take appellant immediately to the booking desk as two ladies were there and appellant's language was not fit for their ears (J. A. 45).

It is of the essence of disorderly conduct under the statute¹³ to curse officers of the law attempting to perform their duty. *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572 (1942). Appellant's objection is that the circumlocution "so-and-so's", substituted for profane and obscene terms actually used, indicated insufficient evidence of disorderly conduct (Br. 24, 33). Had appellant wished the epithets repeated in so many words he had ample opportunity at the trial. His failure to do so was a wise choice as the terms would not, presumably, have enhanced him in the eyes of the jury.

It is therefore concluded that there was no error in the denial of appellant's requested instruction number 6-A (J. A. 5), which would have required an instruction "that as a matter of law defendant Galloway did not commit the offense of disorderly conduct in the presence of Officer Hilton". As the trial court correctly ruled, this "would have amounted to a directed verdict" to which appellant was obviously not entitled to on the record (J. A. 115, 116).

As detailed in appellee's first argument (note 9, *supra*) the denial of this request was the only point involving the court's charge preserved for review. As to other incidental criticisms of the charge in appellant's second argument,¹⁴

¹³ See note 8, *supra*.

¹⁴ For example, appellant asserts that it was error for the court to instruct "that the officer had no right to arrest appellant 'for the theft' of the coat without a warrant" (Br. 22, emphasis by appellant). Yet appellant's requested instruction number 2 (J.A. 2), which appellant at the trial conceded was given in substance (J.A. 114), referred to the arrest as being "for an alleged petty larceny not committed in his presence".

the Government's contention in Argument II is repeated here, that they are afterthoughts which the Court should not consider in the light of appellant's failure to comply with Federal Criminal Rule 30.

III

The Language of the Charge Was Not Objected to; As It Was Not Misleading, No Substantial Right Is Involved

Appellant's third argument consists in the setting forth of various allegedly misleading statements in the charge. As to these appellant concedes (Br. 35) failure to comply with Federal Criminal Rule 30, ordaining that

" . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection"

To excuse non-compliance appellant asserts substantial rights are involved and asks review in the exercise of the Court's discretion under Federal Criminal Rule 52(b).

The appellee repeats its contention, made in the previous two arguments, that appellant's failure to preserve these points is fatal to the review thereof. Especially is this urged in view of the fact that the particular criticisms are but reiterations in essence of what appellant urged in his first two arguments.¹⁵

As pointed out in Argument I, the court gave a cohesive, balanced charge, couched in the court's language, to which no contemporaneous objection was taken. As the charge was based in major part on appellant's requested instructions granted in substance, no substantial right is involved.

¹⁵ Appellant urges again that there "was no doubt from the evidence" that Officer Hilton placed him under arrest when they first met (Br. 31), covered in Argument I, *supra*. He reiterates the claim that there was no evidence that he engaged in disorderly conduct (Br. 32, 33), a point covered in Argument II. Appellant again questions (Br. 29) the posture in which the kicking of Officer Paul was submitted to the jury (Br. 29). See Argument I, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 25 1956

No. 13,010

Joseph W. Stewart
CLERK

ROBERT P. GALLOWAY, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

De Long Harris

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Counsel for Petitioner

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,010

ROBERT P. GALLOWAY, JR. ,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, Section 1291 et seq. , United States Code and Rule 37, Federal Rules of Criminal Procedure. This petition is filed under provision of Rule 26 of the General Rules of this Court. The opinion and judgment of this Court was entered herein May 10, 1956 such that this petition is timely.

STATEMENT OF THE CASE

In the interest of brevity petitioner adopts the statement of the case as contained in appellant's brief pages 2 to 7.

PETITION FOR REHEARING

A rehearing of this cause is respectfully prayed by petitioner upon the grounds following:

THERE WAS SUFFICIENT EVIDENCE UPON WHICH
TO BASE PETITIONER'S PRAYER FOR INSTRUCTION
NUMBER NINE

In its opinion, this Court states that the facts as shown by the evidence in this case did not require or justify the instruction prayed. Petitioner will demonstrate herein that there was such evidence.

Petitioner was convicted only of an assault upon officer Paul (as charged in Count 2 of the indictment). It is clear from the evidence that Paul did not assault petitioner. Petitioner says, however, that the evidence was abundant that officer Paul was either about to assault petitioner or was attempting to assist others in assaulting him and attempting to restrain him of his liberty. It must be borne in mind that the question of the legality of the arrest of petitioner was conceded to be a question of fact by the trial judge (J.A. 116). It is possible, and even probable, that the jury found as a fact that petitioner was illegally arrested. There was evidence to support that position. In this event, petitioner had the right to defend himself against persons seeking to restrain him of his liberty. However, the principal question herein involved is whether or not there was evidence upon which to base an instruction to the effect that petitioner had the right to use reasonable force to defend himself against persons about to or attempting to assist others in assaulting him.

In considering whether or not there was any evidence upon which to predicate such an instruction, the evidence offered by a defendant himself must be considered, for it is not with the province of the trial court to pass upon the credibility of a defendant's testimony. In this regard this Court must consider the testimony of petitioner, Galloway.

The evidence shows unquestionably that on the 2nd floor of the precinct Galloway did in fact assault officer Barbour. He was acquitted of that assault only upon one, or both, of his two theories of defense, either

because of resistance to unlawful arrest or self defense. Now, according to the testimony of Galloway the assaults upon his person continued as he was being dragged to the 1st floor.

"Q. After they started beating you what happened next?

A. Well, Officer Hilton drug me down the steps and **THEY WERE BEATING ME ALONG AS I WAS GOING DOWN THE STEPS AND I WAS HOLLERING AND KICKING AND TRYING TO GET LOOSE.** (J. A. 84)

Q. Now, how many officers brought you downstairs?

A. Let me see. Officer Hilton was dragging me and the others were beating me.

Q. Were you being beaten as you were being dragged down stairs?

A. Yes, I was. (J. A. 89)

Q. Did that beating take place from the second floor down to the first floor.

A. Yes, it did.

Q. And you were still on your feet?

A. I was not on my feet. I was being dragged.

Q. And being hit?

A. That is right. " (J. A. 90)

From the above evidence it could reasonably have been concluded by the jury that petitioner was being assaulted before and at the time of the attempted assistance by officer Paul. There was evidence that Paul was about or attempting to assist the officers who were assaulting petitioner at the time that he received a kick. Officer Hilton, in this regard testified:

"THE COURT: Did Officer Paul come over sir?

THE WITNESS: HE CAME OVER TO ASSIST ME. *

THE COURT: All right sir. How did he come?

THE WITNESS: It was in a hurry. (J. A. 28)

THE COURT: Did Officer Paul come over, sir?

THE WITNESS: He came over to assist me." (J. A. 28)

* Emphasis supplied.

Officer John R. O'Brien's testimony shows that petitioner was fighting to get away at the time that officer Paul came over to assist. In pertinent portion, his testimony is:

"Q. When they got approximately five feet from the bottom of the stairs Mr. Galloway broke loose from Hilton and at the same time Officer Paul, who was sitting at the switchboard, got up and started through the little gate that separates the office from the corridor. As Officer Hilton reached for Galloway, he caught him around the chest. At that moment Officer Paul came through the entrance, and as Private Hilton seized Galloway, Galloway left the floor and caught Private Hilton in the groin. Private Paul hit the floor. (J. A. 31)

Q. Now when Officer Hilton first got Galloway on the first floor, did you see Galloway kicking up and down?

A. Before he kicked Officer Paul?

Q. Yes, sir.

A. He was struggling, trying to get away." (J. A. 33)

Officer Paul, the allegedly assaulted officer, himself, testified:

"Q. How were they coming down?

A. Officer Hilton was coming down the steps backwards and he had an arm-hold on Galloway, and Galloway was fighting to attempt to get away.

.....

A. I saw him as I went to Officer Hilton's assistance."
(J. A. 41)

In view of the foregoing, petitioner points out that the trial court recognized his theory of self-defense and did generally instruct as to the general law of self-defense.

But, the trial court did not give the prayer or request for instruction number 9 which would have given to the jury the law in the situation shown by the evidence above. There is no question but that Paul was about to assist petitioner's assailants or he was attempting to assist the other officers in keeping petitioner in unlawful custody. It was therefore incumbent upon the Court to give an instruction bearing upon the facts. The

Court should have instructed upon the subject even though it denied petitioner's prayer number 9 which read as follows:

"You are instructed:

In this case the defendant has testified that he was first struck by officer Barbour. If you find this to be a fact, then you are instructed that it then became the legal right of Galloway to defend himself and to repel all persons whom he reasonably believed were about to assault him or who were attempting to assault him or who were engaged in assisting another to assault him, with such force as Galloway reasonably believed necessary to repel his assailant or assailants.

Unless you are convinced beyond a reasonable doubt that Galloway did not act in self defense as outlined to you above, then your verdict must be NOT GUILTY on both counts of the indictment."

We have, evidence of the fact that petitioner was being beaten while, and after, being dragged down the steps and evidence of Officer Paul coming to the assistance of Hilton who was dragging him while other officers beat petitioner.

Surely the instruction requested was well founded in the evidence and did justify the instruction requested.

Petitioner again points out that it was not necessary that there be a preponderance of evidence in this regard but merely that there be SOME evidence.

Petitioner prays this Court to re-consider the evidence as set forth above and requests the Court to grant unto him a re-hearing upon this point.

Respectfully submitted,

De Long Harris

1901 Eleventh Street, N. W.
Washington 1, D. C.

Attorney for Petitioner

CERTIFICATE OF COUNSEL UNDER RULE 26

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

De Long Harris,
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing were served upon Oliver Gasch, Esq., Counsel for Appellee, on the 25th day of May, 1956.

De Long Harris,
Counsel for Petitioner